University of Alberta

Cooperative Management, Consultation and the Reconciliation of Rights: Canadian Aboriginal Law and a Case Study in Northern Alberta

by

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A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the

requirements for the degree of *Master of Arts*

Department of *Anthropology*

Edmonton, Alberta
Spring 2006

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Your file Votre référence
ISBN: 0-494-13755-X
Our file Notre référence
ISBN: 0-494-13755-X

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Abstract

The Little Red River Cree Nation (LRRCN) people have maintained a unique way of life in the boreal forest of northern Alberta for hundreds of years. In 1899, the LRRCN signed Treaty 8 with the Crown, which recognized the activities of hunting, fishing and trapping as subsistence rights. Since 1899, the Treaty 8 area has become a centre of resource development in Alberta, and development activities often threaten to impact the Treaty rights of the LRRCN. One way LRRCN has attempted to gain greater control over their traditional lands and minimize these impacts is through cooperative management. Recently, the Courts have also indicated that the Crown has a duty to consult with First Nations people when their rights may be impacted by resource development. This research evaluates if the cooperative management approach may discharge the duty to consult and accomplish the goals of Aboriginal community self-reliance and well being.

Acknowledgements

This research would not have been possible without the help and support of a number of individuals and institutions. If I forget to mention anyone, it is surely not my intention. Foremost I would like to thank the Little Red River Cree Nation for allowing me draw from their unique culture, history and circumstance as the case study for this research. Specifically, the efforts and vision of Jim Webb helped guide the project from its inception.

I would like to acknowledge the support of the Department of Anthropology in the provision of office space, advice and sound instruction. Thanks to Gail Mathew for her patience and direction each step of the way. To Dr. Andie Palmer I would like to extend special thanks, for taking up the challenge of getting involved in the project late in the game and bringing a unique and holistic perspective to the committee. Your understanding of the legal and anthropological components of the research is a rare commodity and illustrates the diversity of talent resident in the Department of Anthropology at the University of Alberta.

To my two supervisors, Dr. Clifford Hickey and Professor Catherine Bell, I offer my most sincere gratitude. Your commitment to this project cannot be understated. From the beginning you have remained confident in my ability to perform the research, even when my own confidence was shaken. Despite the rapidly changing legal landscape, you remained firm in your promise to support me. Through drafts, unlimited emails, and endless questions you remained patient and a source of encouragement. Your advice and ideas have been priceless and your

leadership set out the path that has led me to completion. Thank you for your relentless pursuit of professionalism and immovable character. Your adherence to a higher standard is an enduring tribute to the essence of academic achievement.

Finally, I would like to thank my wife, Colleen. Thank you, Colleen, without your love and support none of this would be possible. You allowed me to dream, and then willingly sacrificed so that my dream would come true. Thanks for putting up with me and being at my side each step of the way, even in the darkest times.

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1. Introduction

1.1 Rationale and Research Questions

Timber productive lands compose 25.70 million hectares of land in the Province of Alberta with 87% of those lands being owned by the province, 5% under private ownership and 7% (including those encompassed in First Nation lands) falling under the auspices of the federal government (National Aboriginal Forestry Association 2003:50). The northern portion of the province is home to only 6.3% of the total provincial population (Schneider 2002:12). However, this same area is home to 51% of Alberta's Aboriginal population (Government of Alberta 1998a:27) that are situated in forest-dependent communities scattered throughout this area which contains 90% of the remaining forested lands in the province (Government of Alberta 1998b:88). This region also accounts for 42% of oil production, 37% of gas production, the totality of the province's production of oil sands, and all the conjoining activities that these may imply (Ross 2003:1).

The Little Red River Cree Nation (LRRCN) people have maintained a living in northern Alberta for hundreds of years. Most of the lands employed by LRRCN for traditional and cultural activities are forested lands. The importance of the forest to sustaining integral activities for First Nations culture is well documented (Tanner 1979; Brightman 1993; Nelson 1983). Nelson (2003) has clearly shown that the forest continues to be important in the LRRCN context, with virtually all LRRCN communities deriving some measure of their livelihood from activities based in the forest.

Over time, certain First Nation traditional uses have gained recognition and protection through Treaty or agreement, and more recently as rights under the Canadian *Constitution Act, 1982.* This recognition has been both a blessing and a curse. We live in a society that perceives 'rights' to be things that are completely definable, fully comprehensible by others and susceptible to being reconciled with other 'rights' as necessary. But First Nations traditional uses of land are not fully comprehensible by non-Natives and definitely have very important intangible or meta-attributes which are essential to the integrity of First Nation culture. Nelson (2003) has shown that LRRCN symbolic and material values of subsistence harvesting are linked and cannot be maintained in any meaningful way without one another. Newhouse (2000) even suggests that these cultural activities help bind Aboriginal groups together as they move to form a new self-image and place in Canadian society, even though the day-to-day lives of Aboriginal groups may differ substantially from

their ancestors. Hunting, trapping and fishing are more than a way of procuring food: they are a way of transferring ancient knowledge about landscapes and ecology and natural cycles; they are permeated with cultural and spiritual belief, custom and ideology; they give purpose and context to language and tradition; they enforce cultural values and are laden with cultural protocol and may help define socio-political structures; they may give context to traditional law; they may give reason for producing and transferring important aspects of material cultural heritage; they may support a traditional economy and values pertaining to sharing resources. This means that land management and resource development decisions may affect the ability of First Nations culture to perpetuate itself and remain responsive to social, political, economic and environmental changes. Rights to hunt, trap and fish should be perceived as more than legal recognition of an economic activity. Rights protect activities essential for cultural survival and for the LRRCN, the integrity of the forest is essential for the maintenance of rights.

In the recent landmark ruling *British Columbia v. Canadian Forest Products Ltd.* (1 SCC 38 [2004]), the Supreme Court of Canada hinted that it is prepared to recognize the intrinsic value of the forest.[1] This implies a growing realization that the forest is more than trees and animals and has an intrinsic value: its sum is greater than its parts, and there needs to be accountability when needless damage is inflicted or negligent behaviour jeopardizes its integrity. Of course this also begs the question "what are the duties or obligations on the Crown to consider the constitutionally protected Aboriginal and Treaty rights which maintain the integral cultural activities of First Nations that exist in the forest?" In *British Columbia v. Canadian Forest Products Ltd.* the Court refers to the solemn fiduciary duties of the Crown that are owed to the public at large. Indeed, Aboriginal people are members of the public and would be entitled to that consideration. However, in other cases the Court has described a different, special relationship with First Nations—a *sui generis* relationship. What are the obligations with respect to First Nations in forest management? What about with respect to

[1] In this case the Court considered the level of compensation that Canadian Forest Products Ltd. (Canfor) was to pay British Columbia for a forest fire for which Canfor was largely responsible. The fire precipitated by Canfor occurred in 1992 and burned 1491 hectares in Northern B.C. which included a vast number of trees, fish and a drinking water source. As well, fifteen percent of the trees were from an area protected from commercial logging. At trial Canfor was ordered to pay almost 2.5 million dollars to the B.C. government; however, the trial judge was unwilling to consider damages over and above what it had cost the province to fight the fire and reforest the area. The Supreme Court held that, although the compensation would remain 2.5 million dollars, the actual amount of compensation could have been a lot higher had the Crown led evidence of the nature and importance of the wildlife habitat, the uniqueness of the ecosystem, the environmental services provided by the area and the recreational and emotional value of the area to the public (para. 60). Interestingly, the Court even went so far as to note that there could be "potential liability" for inactivity when confronted with threat to the environment in consideration of fiduciary duties owed to the public at large (para. 81).

more broad management of public lands in resource development and land management? How does one reconcile the use of the forest by Aboriginal peoples with other interests? Since First Nation 'rights', and the forest in which they persist, play a central role in the cultural sustainability[2] of LRRCN, it only makes sense that the LRRCN should have a say in the management decisions affecting them.

One method that Alberta has utilized to fulfil any obligations it may hold with respect to First Nations in the management of public lands is through cooperative management. Honda-McNeil (2000:59-60) has shown that from the government perspective cooperative management in the Alberta context is most attractive as 1) a means to reduce legal liability on the Crown by involving First Nations in management decisions that affect their traditional use areas (consultation with First Nations) and 2) as a means to build partnerships with First Nations and increase economic development opportunities (enhanced Aboriginal participation). However, Natcher's work (1999) illustrates that cooperative management has been employed by First Nations to maintain some measure of control over traditional lands, thereby sustaining cultural use and activity. LRRCN has likewise attempted to assert its rights on the land through several means, including cooperative management (LRRCN 2000a; 2000b). The idea is that if they increase their role in the stewardship and management of the forest, then they will have a better chance of maintaining its integrity as a viable medium for the continued performance of cultural activities. In essence, LRRCN looks to cooperative management as a tool for self-reliance and community health and as a mechanism for ensuring cultural sustainability.

There is divergence between the government and First Nation perspective on cooperative management. But this divergence in perspective need not be a barrier to utilizing the cooperative management process, as long as the expectations and interests of both parties can be met—hence, the focus of this research, as represented in the following research questions:

1) Does the Cooperative Management Planning process, established under the LRRCN-Alberta Memorandum of Understanding (MOU), satisfy the Crown duty to consult LRRCN in relation to Crown decisions which have the potential to infringe on Aboriginal and Treaty rights and interests?

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[2] Cultural sustainability has been defined as follows (Susan Wismer, cited in LRRCN 2000b; 2001a): "...a development/resource use process that meets the cultural/material needs of present generations, without compromising the ability of future generations to retain their cultural identity, social relationships and values, and for the management of human-use of resources which is consistent with the cultural values of a peoples."

2) Does the Cooperative Management Planning process, established under the MOU, provide an effective institutional framework for implementing the Aboriginal community self-reliance and community wellness commitments outlined in *Strengthening Relationships: The Government of Alberta's Aboriginal Policy Framework* (2000) (APF)?

Based on these research questions, two general hypotheses were formed at the outset of this project. The hypotheses are designed to guide the content of the research and to focus the complex subject matter into a clear area of investigation.

Hypotheses:

1) It is anticipated that the Cooperative Management Planning process established under the LRRCN MOU may be utilized to discharge any potential Crown duty to consult with LRRCN in relation to Crown decisions which have the potential to infringe on Aboriginal and Treaty rights.

2) It is anticipated that the Cooperative Management Planning process established under the LRRCN MOU provides an effective institutional framework for implementing the Aboriginal community self-reliance and wellness commitments outlined in the APF.

To test my first hypothesis I consider and analyse current case law and discussion around the Crown 'duty to consult' First Nations people. I find that consultation is sourced in the honour of the Crown and is a key instrument to balance and reconcile interests and that consultation exists along a spectrum which has minimal requirements at one end and more strenuous standards at the other. In order to help flesh out and contextualize the requirements of consultation I will consider the nature and purpose of Treaty 8 and the *Royal Proclamation, 1763*, the precepts of general fiduciary law, and how fiduciary law has been applied to the Crown-Native relationship in Canada, including the ways in which provincial Crowns might share in the fiduciary requirements. I suggest that although the source of consultation is the clearly the honour of the Crown, a fiduciary duty is also activated in the Treaty 8 context due to the specificity of negotiated Indian subsistence rights. The fiduciary duty has the effect of pushing the requirements of consultation further up the spectrum from minimal criteria to more strenuous standards, including accommodation. From this analysis I forward a multi-stage consultative process and several requirements of consultation accommodation, which I then use as an instrument to measure the effectiveness of the cooperative management process to discharge the duties of the Crown. My first hypothesis is proven mostly in the affirmative: I illustrate that the cooperative planning process established

under the LRRCN MOU satisfies the potential Crown duty to consult First Nations, but only in contexts that share the unique attributes of the LRRCN situation.

To test my second hypothesis I consider what is meant by 'community well-being' and 'self reliance'. I suggest that these terms should encompass the LRRCN perspective, which contemplates the continued performance of integral activities which are essential to maintaining LRRCN culture. In this view the question actually refers to whether the LRRCN MOU process represents an effective institutional framework for ensuring Aboriginal cultural sustainability and therefore, if the LRRCN MOU process is a mechanism which maintains the honour and integrity of the Crown in the consultation process. My second hypothesis is proven in the affirmative and I conclude that the cooperative management planning process, established under the MOU does represent an adequate vehicle for providing an effective institutional framework for implementing the Aboriginal community self-reliance and wellness commitments outlined in the APF.

1.2 Phase 1: Planning

From the outset it was obvious that any investigation into the selected research questions would have to employ aspects of both law and anthropology in order to fully understand the issues. Support and training for anthropological method and theory was available from my home department and through my supervisor in Anthropology, Professor Cliff Hickey. However, it was soon apparent that I would need to build my capacity for legal research and analysis. Even designing the research questions required a significant understanding of the legal issues, which I did not have. After a brief consultation with Professor Hickey, it was decided that in order to go any further I would need a co-supervisor who was an expert in law and who had the knowledge and skills required to guide the legal portion of the research. Because legal experts in Aboriginal law with an interest in anthropological research are virtually impossible to find, I was confronted early on with the very real possibility of not being able to pursue the research at all. Thankfully, Catherine Bell of the Faculty of Law (University of Alberta) graciously offered her time and devotion to the project.

Building my capacity for legal research and analysis came in several ways. First, I negotiated with the Faculty of Law to take Aboriginal law for credit towards my degree. The Aboriginal law course was extremely informative and was essential to building my legal research skills. However, it also woke me to the sobering reality of just how broad, complex

and challenging my chosen research questions were. Additional capacity came through my subsequent involvement as a research assistant in two very important research projects based in the faculty of law, but funded through the Social Sciences and Humanities Research Council (SSHRC). The first was the Canadian Forum on Civil Justice's 'Civil Justice System and the Public Research Project', the second was the 'Protection and Repatriation of First Nation Cultural Heritage Research Project'. Both of these projects were national in scope and had an extensive legal research component; however both also touched on issues that clearly had implications for social research. As a result, I was involved in legal research and analysis as well as community-based research including interviews, conversational analysis, qualitative analysis of data sets and critical observation. Involvement with these projects increased my legal and social research capacity but also provided me with an appreciation of how legal and social issues may be intertwined and may require unique methods and approaches to answer important questions.

Another facet of the planning phase of the project involved consulting with stakeholders in the research to gain insight into the issues and focus the research questions. Representatives from government and the legal community were consulted using my thesis prospectus as a medium for discussion. Information and ideas from all sides were incorporated into the research design. Talking to the parties that were the subject of my research revealed a divergence in perspective and increased stakeholder buy-in. A further advantage to this strategy was that many of those individuals continued to share information and ideas with me and directed me to additional resources and information. The outcome ensured that the project was socially relevant and that all pertinent issues were identified and addressed in the research.

1.3 Phase 2: Conducting

The broad theoretical framework that guides the research is underpinned with a more specific and concise strategy to answer the research questions and test my hypotheses. For these reasons, I employ a 'back to the basics' approach. The evaluation of consultation, its relation to the *sui generis* fiduciary relationship and the broader goals of consultation combine to provide the yardstick by which I measure the tenability of cooperative management as a vehicle for consultation specifically and for discharging any duties of the Crown more generally. Using this approach requires the employment of both social and legal areas of inquiry, which will now be discussed in greater detail.

On the social research side I reviewed anthropological method and theory, analysed previous social research conducted with LRRCN, examined the purpose and design of cooperative management structures, researched Aboriginal forest tenure allocation in Canada, and studied the history of the Treaty 8 area. This was partially accomplished by focussing my coursework in these areas, utilizing University of Alberta library databases to conduct a literature review of all relevant literature and using the Sustainable Forest Management Network's online clearinghouse of research reports and results. Other information was gathered by reviewing theses and dissertations that focussed on LRRCN, cooperative management or other First Nation/resource management issues. I also reviewed information and literature posted on Alberta Ministry websites. To examine the historical relationship between Alberta and LRRCN, archival materials housed at the University of Alberta were consulted, as were archival records presented in secondary form in various sources held in the University of Alberta libraries. Other archival materials were obtained via the University inter-library loan system. Funding was secured to visit the National Archives of Canada housed in Ottawa and a research trip to the archives was conducted in winter of 2002-2003.

On the legal research side I gathered relevant case law that focused on Aboriginal law and fiduciary law by consulting relevant legal resources including law reporters and legal research databases. In addition, primary sources informed me of certain key areas such as federal and provincial jurisdictional issues and written history around Treaty negotiation. Secondary sources were researched using periodical indexes and search databases, and these were generally employed to inform me of current legal theory pertaining to Aboriginal law issues. An overview of contemporary and historical legislation, regulation and policy was also undertaken. This required extensive library and internet-based research and involved the review of many documents including the *Natural Resources Transfer Agreements, 1930* (NRTA), the *British North America Act, 1867* and the *Constitution Act, 1982*, various manifestations of the *Indian Act* and provincial legislation and regulations respecting fish and wildlife management and resource allocation both in Alberta and other provincial jurisdictions.

1.4 General Challenges and Limitations of the Research

One challenge that became more difficult to manage as the project matured was the incredible upheaval and rapid change underway in this area. Courts continue to define the nature of the rights and interests held by Aboriginal people in Alberta, the policy context for

resource management continues to mutate, and the values and needs of those involved directly or indirectly are dynamic. Even in the few short years in which this research was undertaken, massive changes to this landscape occurred. Relevant and often conflicting Court decisions were handed down which had direct application to the research. Government, industry and First Nation representatives also changed and the LRRCN MOU was not renewed in 2001, which had the effect of putting the entire cooperative management process on hold.

The release of the Federal Court of Appeal decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (FCA No. 66 [2004]) and the release of the Supreme Court decision in *Haida Nation v. British Columbia (Minister of Forests)* (SCJ No. 70 [2004]) dealt a serious challenge to my theoretical approach. In *Mikisew*, a majority of the Federal Court of Appeal held that there was no free standing duty to consult when the Crown uses its powers under Treaty 8 to "take up" lands for development and settlement purposes. Essentially, the Court held that there are no cognizable subsistence Treaty rights when the Crown takes up land because the Crown rights qualify subsistence provisions in the Treaty. Given that this research suggests that in a Treaty 8 context subsistence rights are sufficiently specific to activate a fiduciary component to consultation, this was a serious problem. Accepting this reasoning would mean that there would be no cognizable Aboriginal or Treaty right in which to ground a fiduciary duty. Exacerbating the challenge was the fact that this decision was released only weeks before the scheduled defence of my thesis. Below in section 4.3 I discuss the reasoning of the Federal Court of Appeal in *Mikisew* and illustrate that this reasoning is flawed for several reasons including:

1. The Court does not adequately consider cumulative effects of development on the landscape in its analysis.

2. The Court improperly interprets the Treaty rights at stake and the Crown's right to "take up" lands, given the nature and purpose of Treaty 8 as well as the honour of the Crown.

3. The Court fails to consider the commitments of the Crown in Treaty 8 that the way of life and cultural sustainability of First Nations would be assured.

4. The recent Supreme Court decision in *Haida Nation v. British Columbia (Minister of Forests)* has illustrated that consultation is required even in cases where there is a credible but unproven claim.

Through analysis of these key points it is illustrated that the arguments made in this paper still hold, and analysis of the adequacy of the Cooperative Management Planning Process under the LRRCN MOU to meet the duty to consult is still valid.

In *Haida*, the Supreme Court ridiculed the application of a general fiduciary duty to the Crown-Native relationship in a way that would imply a "universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples" (para. 18). Instead, the Court reiterated what it said in *Wewaykum Indian Band v. Canada* (SCJ No. 79 [2002]), specifically that the "fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests" (para. 81). This had implications for my research, given that my analysis of legal literature and my review of Court decisions from across Canada (prior to the release of *Haida*) clearly implied that the duty of consultation was sourced in the fiduciary component of the relationship. Much of my analysis of the content of consultation was therefore intertwined with the concept of a broad fiduciary duty. For example, I had considered a broad fiduciary duty with respect to cultural sustainability and fundamental principles of consultation that would apply in all circumstances; however, the Supreme Court instead suggested a narrow view of the fiduciary duty as well as a spectrum of requirements that would meet the duty to consult in different cases. Significant revisions were required in order to adapt some of the concepts in *Haida* to my analysis. In the end, rather than painting consultation in Alberta with a broad fiduciary brush, I outline the direction of the Supreme Court in *Haida* and apply the decision to an Alberta context where "land cession" Treaties cover the entirety of the province. The result is that I apply the spectrum suggested by *Haida* but suggest that Treaty 8 rights are "specific interests" which may attract the fiduciary component of the honour of the Crown. I argue that the fiduciary component augments the duty, thus pushing the requirement of consultation further up the spectrum. The paper retains a substantive fiduciary component in order to properly frame the requirements the duty may warrant with respect to consultation and accommodation in the Treaty 8 context. Properly framing the duty is important because consultation is a key tool in the ongoing process of reconciliation between the Crown and First Nations people, and the content of the duty has implications for viability of subsistence rights, on which LRRCN culture depends.

The fact that the law is uncertain and the current MOU process is on hold does not make this research untimely or invalid for several reasons:

1. Alberta continues to participate in cooperative management processes and consultation with other First Nations in the province;

2. The LRRCN-Alberta process may be revisited and may require alteration and improvement to be reconsidered as a viable method for Aboriginal involvement, and;

3. If the LRRCN-Alberta cooperative management process is not reinstated, there will undoubtedly be consideration as to what could have prevented its demise.

Other challenges existed in some of the supplemental components of the research. These components were meant to elucidate the relationship between Alberta and LRRCN. Archival research as to the undertaking of the provincial Crown would enhance my ability to gauge the nature of the relationship between LRRCN and the Crown and determine the obligations on the Crown and how those obligations might be discharged. Community research would be geared towards determining LRRCN's perspective on the obligations owed to them, based on promises made in Treaty and discussions pertaining to the purpose and goal of cooperative management. I applied for and received funding to undertake community-based research with LRRCN and also to visit the National Archives of Canada. I also spoke with the community and secured tentative permission to research the Band records for the archival information I required.

The research at the National Archives was conducted in the winter of 2002-2003. This trip was meant to enhance information drawn from the LRRCN Band records in order to gauge the specific undertaking and relationship of Alberta towards LRRCN. Unfortunately, the law firm for the Band who was holding the records could not permit me access to them because the federal government had accepted a specific claim for review and the Band records contained sensitive information which could prejudice the interests of the community. My research scheduled to be undertaken in the community experienced an unfortunate coincidence with Band elections, which delayed and eventually derailed my attempts to coordinate a time to conduct research at LRRCN. Hence, although questions were drafted, tentative ethics approval was granted and the community leadership expressed interest in this aspect of the research, it was eventually agreed that community interviews would not be undertaken. In hindsight, this was likely for the best, given timelines and the complexity of the research questions.

As a result, the research does not include a comprehensive analysis of the specific undertaking of the provincial Crown toward LRRCN, which ultimately should be undertaken to fully grasp the full extent of the nature and extent of the duties arising under in that specific relationship. However, some information was gathered to inform my analysis of this undertaking. I adapted my research strategy by focusing on available archival information gathered in primary and secondary form and by considering the effect of higher-level

documents between the Crown and LRRCN such as Treaty, the *NRTA*, policy and regulatory developments and wildlife management.

2. Case Study

2.1 The Little Red River Cree Nation: Overview

The LRRCN people have subsisted in a fifty to sixty thousand square kilometre portion of the boreal forest in northern Alberta at least for the past several hundred years. LRRCN people have used this area to support a vibrant and successful way of life and continue to look to the forest to provide future benefits to their community, both in terms of sustaining traditional culture and livelihood and also in terms of bringing long-term employment opportunities and a sustainable economy. In essence, LRRCN people have always relied on the forest to provide self-sufficiency and sustainability and they desire to continue this relationship (LRRCN 2000b; LRRCN 2000c).

LRRCN's demographic information is similar to many other First Nations in Canada with a rapidly declining elderly population and a burgeoning population of young people. Currently 75% of members are under the age of 30, which is three times the national average (Indian and Northern Affairs 2001). In fact Woodrow and Campa (2001) suggest that if population growth continues at this rate, the population of LRRCN could double by the year 2021. Nelson (2003:9) suggests that this could have drastic consequences for subsistence and natural resource use in the area, as there are insufficient employment opportunities to meet the needs of current Band members, let alone future generations. In other words, when one combines the demographic picture with the inflated price of store-bought goods in an atmosphere of relatively constant incomes on reserve, this likely means that there will be an increased demand for bush resources in the long term (Nelson 2003:9), as well as a growing need to supplement bush resources with gainful employment.[3] However, providing a satisfactory living and meaningful jobs to a growing population while trying to save some semblance of cultural protocol and traditional ideology is no simple task. Jette (1993:122) describes the situation this way:

> Aboriginal people in Canada are in the midst of an abrupt transition from traditional societies to the free-wheeling, anything goes ambience of a fully developed consumer society devoid of culturally relevant business practices. In fact, Aboriginal people in Canada are on the brink of an abrupt transition from the position of being considered wards of a paternalistic state, having little say in the conduct of their own affairs, to the position of being considered masters of their own destiny, having clear

[3] Indeed, as Ghostkeeper notes (1991:35): "For most aboriginal people today, the bush economy can no longer provide all the staples it once did. Our population has clearly grown beyond the capacity of the land to provide enough food. While hunting, fishing, trapping and gathering continue to be important...income must also be earned in other sectors of the economy...[aboriginal people] have certainly earned a lot of pay cheques in the forest industry this century, and this trend will continue."

> jurisdiction over matters related to prosperity and self-determination that must be determined by their own leadership...Aboriginal economies are struggling with the pressure to respect tradition and, at the same time, move ahead into a productive future of economic stability.

The frustration presented by these challenges (managing radical change, creating jobs with limited access to resources and maintaining culture values and practices on the land within development plans while trying to remain competitive in the marketplace) are also relayed by Anaquod (1993:177):

> With the possible exception of some recent and pending land settlements, the vast majority of First Nation reserves and Aboriginal communities are small and of marginal economic value. Our once great empires have been reduced to islands of poverty surrounded by a sea of plenty. Governments have taken our land and resources and we are now being told to take care of ourselves and become "self-sufficient". The hypocrisy of it all.

The LRRCN shares many of the same challenges as other First Nations groups. The origin of many of these challenges stem from historical developments in the relationship between First Nations and the Crown and the changes wrought by the assertion and acquisition of Crown sovereignty in the lands traditionally used by First Nations people. In the LRRCN case, the Band adhered to Treaty 8 in 1899 and the people were settled on reserves between 1940 and 1960. Soon after, ceded lands were opened up by the provincial government for agriculture, forestry and oil and gas development. Though Treaty and Aboriginal rights continued for the traditional vocations of subsistence hunting, trapping and fishing in these traditional territories, the LRRCN were never consulted during this period of intensive development. Instead, the provincial Crown utilized its powers and tenure to promote resource development, without considering the detriment the ecological footprint of these activities might bring to the traditional Native economy and the sustainability of the LRRCN way of life. Hence, to properly frame a discussion on resource management issues in the traditional territory of LRRCN, one first must consider the meaning of Treaty governing those areas.

2.2 Treaty 8

The Boreal forest region of Alberta is almost enclosed within the boundaries of Treaty 8. The total area covered by Treaty 8 extends much further, extending all the way to the southern shores of Great Slave Lake on its northern perimeter; a portion of Saskatchewan in its eastern extent and the eastern slopes of the Rocky Mountain Range on its western front

(also known as the 'Peace River Block' in British Columbia). Treaty 8 was signed in 1899 at Lesser Slave Lake with twelve separate adhesions to the Treaty being signed in 1899 and 1900 in other districts. But the full and complete terms of Treaty are not understood simply with reference to the written portion of the Treaty. In fact, in the recent case of *R. v. Marshall* (3 S.C.R. 456 [1999]) the Supreme Court was very clear that in order to properly understand a Treaty one must fully consider the "historical and cultural context" (para. 11) of the Treaty document, even where the written terms of Treaty may appear unambiguous. Comprehending this milieu can also mean deference to the oral or implied terms of the Treaty, the verbal promises made during its negotiation (paras. 12, 14, 20), as well as the "stated objectives" and the "political and economic context in which those objectives were reconciled" (para. 41). Because Treaty was a key instrument used to effect reconciliation between the parties, one must consider what those interests were and the "common intention" (para 39) of the parties in the negotiation of the Treaty. Only then can one begin to understand how the Treaty should be interpreted or implemented.

It is also important to acknowledge that these key precepts are not new; instead, they supplement and enhance previous guidance given by the Courts. For example:

1. Aboriginal Treaties are a unique type of agreement and therefore require special principles of interpretation (*R. v. Sundown* (1 S.C.R. 393 at para. 24 [1999]); *R. v. Badger* (1 S.C.R. 771 [1996] at para. 78); *Benoit v. Canada* (2 C.N.L.R. 1 (FC) [2002] at para. 10).
2. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed (*R. v. Badger*, 1 S.C.R. 771 at para. 41 [1996]); *Benoit v. Canada*, 2 C.N.L.R. 1 (FC) [2002] at para. 10).
3. Interpretations of Treaties and statutory provisions that have an impact on Treaty or Aboriginal rights have to be considered in ways that maintain the integrity of the Crown (*R. v. Badger*, 1 S.C.R. 771 [1996] at para. 41).
4. In searching for the signatories' respective understanding and intentions, the Court must be sensitive to the unique cultural and linguistic differences between the parties (*R. v. Badger*, 1 S.C.R. 771 [1996]; *R. v. Horseman* 1 S.C.R. 901 [1990] at pp. 907).
5. Treaties are an exchange of solemn promises, and it must always be assumed that the Crown intends to keep its promises (*R. v. Badger*, 1 S.C.R. 771 [1996] at para. 41; *R. v. Sioui*, 1 S.C.R. 1025 [1990] at para. 96; *R. v. Simon*, 2 S.C.R. 387 [1985] at para.24; *R. v. Sparrow*, 1 S.C.R. 1075 [1990] at 1107-8).
6. The words of the Treaty should be understood in the way they would have been by the parties at the time, and a technical interpretation of Treaty wording should be avoided (*R. v. Badger*, 1 S.C.R. 771 [1996] at paras. 52-54; *Nowegijick v. The Queen*, 1 S.C.R. 29 [1983] at 36).
7. Any ambiguities and doubtful expressions in the Treaty must be resolved in favour of the Indians (*R. v. Simon*, 2 S.C.R. 387 [1985] at para. 27; *Nowegijick v. The Queen*, 1 S.C.R. 29 [1983] at 36).
8. The laws of evidence must accommodate oral histories in order to effect a meaningful interpretation of Treaties (*Delgamuukw v. British Columbia*, 1 C.N.L.R. 14 (S.C.C.) [1998] at para. 87).

9. While construing the language generously, Courts cannot alter the terms of the Treaty by exceeding what is possible in the language or what is realistic (*Benoit v. Canada*, . 2 C.N.L.R. 1 (FC) [2002] at para. 10; *R. v. Badger*, 1 S.C.R. 771 [1996] at para. 76; *R. v. Horseman*, 1 S.C.R. 901 [1990] at pp. 908).
10. Treaty rights of Aboriginal peoples are not frozen in time and must not be interpreted in a static or rigid way (*Benoit v. Canada*, 2 C.N.L.R. 1 (FC) [2002] at para. 10; *R. v. Sundown*, 1 S.C.R. 393 [1999] at para. 32; *R. v. Simon*, 2 S.C.R. 387 [1985] at pp. 402).

A practical way to approach this doctrine is by using a two-step process (*Benoit v. Canada*, 2 C.N.L.R. 1 (FC) [2002] at para. 10; *R. v. Marshall*, 177 D.L.R. (4th) 513 at para. 12). The first step is an examination of the written terms of the Treaty and all extrinsic evidence for all possible interpretations. As noted in *Benoit* (para. 10) the purpose at this stage is to "develop a preliminary, but not necessarily determinative, framework for the historical context inquiry". Next, the best possible interpretation should be selected with reference to the cultural and historical backdrop.[4] Treaty is a mechanism that is employed by both the Crown and Native peoples to bring fair and equitable reconciliation and the final choice is determined with reference to which interpretation best reconciles the parties' interests. In other words, the interpretation that most effectively reflects the 'common intention' of the parties is the proper one. These principles suggest that to fully understand the meaning of Treaty 8 and its effect on the relationship between the LRRCN and the Crown, one must determine the common intention of the Crown and First Nations in making Treaty 8.

2.3 The Crown's View of Treaty 8

The Crown's view of the Treaty may be derived from its written text. This is because agents of the Crown drafted the written terms of Treaty 8. The terms portray a clear desire to open the land "for settlement, immigration, trade, travel, mining, lumbering and such other purposes as Her Majesty may seem meet..." and purport to extinguish Aboriginal title in exchange for Treaty rights and privileges such as the establishment of reserves, the payment of annuities, the provision of the implements, instruction and cattle necessary to establish agriculture and animal husbandry in the area and subsistence rights to hunt, trap and fish on all unoccupied Crown lands. The Crown sought to gain the legal surrender of the land and begin the process of "assimilation" through "civilization," similar to what was occurring in the eastern provinces (St. Germain 2001:6). Other goals of the Crown may have been more altruistic and well meaning, considering the provision of supplies, annuities and educational

[4] For and excellent in-depth analysis of treaty interpretation and its practical application see Bell and Buss (2000).

personnel. However, this is difficult to substantiate considering the historical and archival record. For example, Daniel (1999:58) notes that despite clear conditions of starvation among the Indian population of the Peace and Athabasca River areas, it was not until the 1870-80s (when the Crown was able to verify the immeasurable quantities of petroleum in the vicinity) that a Treaty was seriously considered. In fact, a Privy Council report released in 1891 (authorizing the making of Treaty 8) even stated that the area's mineral content and the extinguishment of Aboriginal title were key incentives for the Crown (Daniel 1999:60). This report states (Report of the Privy Council, 26 January 1891):

> ...immense quantities of petroleum exist within certain areas of these regions, as well as the belief that other minerals and substances of economic value, such as Sulphur...[and] Salt... are to be found therein, the development of which may add materially to the pubic wealth, and the further consideration that several railway projects, in connection with this portion of the Dominion, may be give effect to at no such remote date as might be supposed, appear to render it advisable that a treaty or treaties should be made with the Indians who claim those regions as their hunting grounds, with a view to the extinguishment of the Indian title in such portions of the same, as it may be considered in the interest of the public to open up for settlement. The Minister, after fully considering the matter, recommends that negotiations for a treaty be opened up during the ensuing season.

These mineral interests as well as increasing access to the area by the search for gold, the growing interest in settlement by white settlers, and the ongoing concern that increasing presence and activities of outsiders would lead to conflict, eventually compelled the Crown to negotiate Treaty 8 (Daniel 1999:61-66).

Another incentive for the making of a Treaty in this area may have emanated from its remote location and perception as a rugged wilderness. Aboriginal groups in the area generally enjoyed a sustainable and self-sufficient way of life, with little need of government support or interference. The anticipated result was that a Treaty could be negotiated which would both 1) free up the land from the burden of Aboriginal title while simultaneously 2) altering the Indian subsistence and way of life as little as possible. It was assumed that minimal interference would also translate into a minimal financial burden being placed upon the young government of Canada. As Daniel (1999:66) notes, this perception may have been reinforced by the common belief of the time that agriculture would be unsuitable for the area, especially considering the complete lack of capable infrastructure to transport crops to market. In any case, it is clear in the archival and historical record that nobody thought that the area would emerge into the bustling resource metropolis that it is today. It was assumed that the way of life of the Indians would continue in the large part unimpeded, with the exception of the intermittent taking of lands for settlement and other purposes from time to

time. Hence, these rights were acknowledged and entrenched in the Treaty and were supported by the Crown through the annual provision of ammunition and twine.[5] So, although Treaty 8 contained provisions supporting an agrarian lifestyle, the Crown did not anticipate immediate settlement and discussions emphasized the preserving of existing subsistence lifestyles. Reserves were also discussed, but unlike the Treaty process in southern regions, reserve lands were not established until some time after treaty was signed. It is also clear that the Indians of Treaty 8 were not fond of the reserve concept, making this known to the commissioners (Letter from McKenna to Superintendent General April 17, 1899):

> From the information which has come to hand it would appear that the Indians who we are to meet fear the making of a treaty will lead to their being grouped together on reserves. Of course, grouping is not now contemplated; but there is the view that reserves for future use should be provided for in the treaty. I do not think this is necessary... it would appear that the Indians there act rather as individuals than as a nation... They are adverse to living on reserves; and as that country is not one that will be settled extensively for agricultural purposes it is questionable whether it would be good policy to even suggest grouping them in the future. The reserve idea is inconsistent with the life of a hunter, and is only applicable to an agricultural country.[6]

Overall then, the intention of the Crown in the making of Treaty 8 was to assure that the way of life of the Indians would continue while simultaneously ensuring that, if certain lands were needed from time to time, the Crown could take up those lands for settlement and development purposes.

2.4 LRRCN View of Treaty 8

The LRRCN view of Treaty 8 runs counter to the view held by the Crown. When determining the Native perspective, reference to the written terms of the Treaty is not helpful.[7] Although the surrender of the land is clearly the focus of the written document, it is unlikely that the oral agreement reached between the parties involved such a wholesale

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[5] Treaty commissioners David Laird, J.H. Ross and J.A. McKenna make specific reference to the importance of providing twine and ammunition and the assurance of hunting and fishing rights in the area in their report to Clifford Sifton, superintendent general of Indian affairs. These concessions were essential for the successful conclusion of Treaty 8.

[6] The setting aside of lands in severalty also reinforces the uniqueness of the Treaty 8 area.

[7] Slattery (2003) suggests that the written document of the Treaty amounts to nothing more than an internal government memorandum and the true intent of the Treaty can only be found in the oral agreement that was reached between the parties. For discussion on Treaty interpretation see Henderson (1997); Slattery (2000); *R. v. Marshall* (3 S.C.R. 456 [1999]) at para. 53; *R. v. Sioui* (1 S.C.R. 1025 [1990]) at paras. 89-91; *R. v. Taylor and Williams* (34 O.R. (2d) 360 [1982]); *Benoit v. Canada* (2 C.N.L.R. 1 (FC) [2002]).

relinquishing of land rights. It is more likely that the 'surrender' was viewed by Aboriginal signatories as placing Aboriginal tenure under the protection of the Crown, creating a shared territorial jurisdiction (Henderson 1994:262).

Prior to the Treaty, Native people had little direct experience with the exchange of land as a commodity,[8] especially in the quantity that was being surrendered under Treaty 8. However, they had accrued considerable experience in the trade of resources as commodities. Therefore, if they aimed to secure access to resources, this would have been expressed as a demand for the control of resources rather than in terms of land rights under the Canadian legal regime (Daniel 1999:55). Throughout dialogue surrounding the Treaty, it is no wonder that Bands pressured the Treaty commissioners to acknowledge, entrench and protect rights associated with their traditional lifestyle, without insisting the commissioners recognise their possessory rights to the land itself.

The question of whether the Treaty was understood to be a land surrender on a huge scale would likely be answered differently from group to group across the Treaty area, given the large geographic scope of the Treaty area. In his analysis of the data collected in the Treaty and Aboriginal Rights Research "Interview with the Elders Program" of the Indian Association of Alberta, Daniel (1999:94) concludes that, overall, the Treaty 8 Indians understood that some form of land surrender was part of the Treaty, though his conclusion is qualified with the proviso that there is a significant range of views of what the surrender meant. Groups that had more interaction with individuals from southern areas may have discussed the post-treaty effects of earlier numbered Treaties. Others in more remote areas would have had less interaction and would therefore have been less cognisant of the implications of the surrender terms, and subsequently more apt to believe that title[9] to the land was not relinquished. This latter grouping would seem to best describe the specific LRRCN context.[10]

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[8] For an alternate view see Friesen (1999: 204-205): "Men who had for at least a century dealt with the economic demands of the Hudson's Bay Company of American free traders and the political demands of the new nation of the Metis, men who had experienced dislocation, epidemics, and the revolutions of horse and gun, are widely viewed as children in arranging their Treaties with these same Europeans...Indian leaders took this situation and, in most cases, made the best deal they could for their land. There is no doubt in my mind that at least some Indian leaders at the Treaties were well aware that this was a land sale on an enormous scale."

[9] In *Delgamuukw v. B.C.* (3 S.C.R. 1010 [1997]) at pp.1083, C.J.C. Lamer defines Aboriginal title as "the right to exclusive use and occupation of land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures." For an informative analysis of the nature and content of Aboriginal title see McNeil (2000).

[10] For example, in one historical account the headman of a large group of Cree Indians at Little Red River refused to sign Treaty claiming that he could not do so given that it was God that made the sky and earth of

There is also evidence that the Treaty commissioners downplayed the significance of the land surrender terms, focussing instead on the benefits of the Treaty to the Indians. This seems to be supported by several of the testimonies documented by Rene Fumuleau of some of the remaining survivors that were present at Treaty 8. The account of Susie (Joseph) Abel of the Dogribs, who was present at Fort Resolution in the Northwest Territories in 1900, captures the rhetoric of the commissioners regarding land as relayed to the Indians (Fumuleau 1973:90-91):

> The treaty commissioner said, "We don't come to make trouble. We come for peace and to talk about money. We come for peace..." An Indian by the name of N'doah said, "Funny, this is the first time we have gotten free money"... Drygeese [Dogrib Chief] said, "This money never happened before, so we want to know if something will be changed. If it is going to change, if you want to change our lives, then it is no use talking treaty, because without treaty we are making a living for ourselves and our families"...The Agent said, "We are not looking for trouble. It will not change your life. We are just making peace between Whites and Indians—for them to treat each other well...I have come here to issue this money, that is all." Drygeese said, "If that's the way it is, I want to tell you something...I want a written promise from you to prove that you are not taking our land away from us..."

This is one account among many,[11] but it reflects that the oral discussion of terms was markedly different from that which was ultimately codified in the written document.

If there was some level of understanding that some kind of land deal was being struck, it is probable that certain Indian signatories would have understood that the Treaty conveyed powers to the Crown to take up lands from time to time for various purposes. However, it also would have been expected that most of the vast Treaty area would remain untouched, to ensure that their way of life could continue (*R. v. Badger*, 1 S.C.R. 771 [1996] at para. 57). It is clear from the Report of the Commissioners for Treaty 8 that these assurances were essential to the successful conclusion of the Treaty:

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the country and that selling these things would make him guilty of theft (Daniel 1999:86). Daniel (1999:88) notes that it eventually required the intervention of Bishop Grouard to remedy the situation, who explained that it was not a land sale but rather a form of compensation for interference. The headman deemed this explanation credible and the adhesion was subsequently signed.

[11] See e.g., *Re Paulette et al. v. Canada (Registrar of Titles)* (42 D.L.R. (3d) 8 (NWTSC) [1973]). Specifically, at pp.13 Morrow J. notes "(w)hile it may not be pertinent to this Judgment...I think almost every member of the Court party felt that for a short moment the pages of history were being turned back and we were privileged to relive the Treaty-negotiating days in the actual setting...These witnesses, for the most part very old men and women, one of them 101 years old, were dignified and showed that they were and had been persons of strong character and leaders in their respective communities...There is no doubt in my mind that their testimony was the truth and represented their best memory of what to them at the time must have been an important event. It is fortunate indeed that their stories are now preserved." See also Price (1999) for an in depth discussion of the meaning and interpretation of the Alberta Indian Treaties.

> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it. We assured them that the treaty would not lead to any forced interference with their mode of life...

Where doubts or concerns did emerge, they were quickly dispatched with reassurances that the way of life of the Indians would not change. In fact some of the more serious challenges were actually brought by Kinosayoo, a clear leader among many of the Crees and the grandfather of a LRRCN hunter (Pyc 1998:11). Mair (1908:59-60) records an excerpt of Kinosayoo's dialogue:

> You say we are brothers, I cannot understand how we are so. I live differently from you. I can only understand that Indians will benefit in a very small degree from your offer. You have told us you come in the Queen's name. We surely have also a right to say a little as far as that goes...Do you not allow the Indians to make their own conditions, so that they may benefit as much as possible? Why I say this is that we to-day [*sic.*] make arrangements that are to last as long as the sun shines and the water runs. Up to the present I have earned my own living and working in my own way for the Queen. It is good. The Indian loves his way of living and his free life. When I understand you thoroughly I will know better what I shall do. Up to the present I have never seen the time when I could not work for the Queen, and also make my own living. I will consider carefully what you have said.

This doubt was soon quelled by the presence and words of Father Lacombe (Mair 1908:63):

> Your forest and river life will not be changed by the Treaty, and you will have your annuities, as well, year by year, as long as the sun shines and the earth remains. Therefore I finish my speaking by saying, Accept!

Commissioner Ross also consistently assured the Indians "...all the rights you now have will not be interfered with, therefore anything you get in addition must be clear gain" (Mair 1908:60). From the perspective of many Treaty 8 Indians, the Treaty would provide implements, training and a homeland if they desired to settle the land and adopt a sedentary lifestyle; however, it also guaranteed the way of life that they were accustomed to would be preserved as a lasting and viable alternative to agriculture and stock raising. All these things worked together to quash any remaining doubts in the minds of the Native signatories. They were now convinced that the Treaty was in their best interest. Treaty 8 was a solemn

recognition of a relationship, a way of life, and an equitable sharing of the land that would accommodate the interests of everyone—it was a beginning and not an end and a promise that things would stay the same more than they would change. It was an affirmation of the good relations of the past, rather than an agreement to drastically change the economic and political structure for the future (Daniel 1999:79-85).

2.5 Putting the Treaty in Context

The Treaty 8 commissioners had a tough job to do: they had a pre-drafted Treaty given to them by their superiors, a budget to work within, a limited ability to communicate directly with the vast majority of the people with which they were to supposed to sign Treaty, and a vast expanse of land to cover in a very short period of time. In addition, the expansion of the railway system was bringing in white settlers from across the country and prospectors were flooding in from all over North America. As a result, non-Aboriginal competition for hunting, trapping and fishing was on the rise (see generally, Fumuleau 1973).[12] Aboriginal groups had seen the increase in activity and felt first-hand the effects of competition for resources. These groups had also experienced famine, disease and other hardships as a direct result of the influx (Fumuleau 1973:23-39) and they understood that the government wanted to share some of their land for settlement and other purposes (Macklem 1997:119). However, they were also very concerned that any proposed sharing scheme might impact their traditional way of life.[13]

The only chance for the commissioners to succeed in their mandate was to expedite the Treaty negotiations, which in turn would require the creation of an atmosphere of honesty, transparency, trust and solemnity. Doubt needed to be quieted in the minds of the Native people, and the premeditated mixture of characters at the Treaty ceremony surely bestowed legitimacy on the process. For example, Treaty was often made at Hudson's Bay Company posts with company representatives present. This would have been persuasive among Indian groups that had a long-standing, trust-based relationship with the company.[14] Indeed, before the establishment of Canada as a nation in 1867 and even up until the time of

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[12] Similar reasons for Treaty were also present in Treaty 9, see generally Macklem (1997).

[13] For background note the verbal exchange between Keenooshayo and David Laird at the negotiations at Lesser Slave Lake (Mair 1908: 59-60).

[14] For an excellent account of the relationship between the Company and the Native groups in the early years of the fur trade see Ray (1978). This is not to suggest that relations with the 'Great Company' were always peaceful and harmonious. For an interesting example of how the Hudson Bay Company used its monopoly to its advantage at the expense of Indian peoples after its merger with the Northwest company in 1821, see Ray (1975).

Treaty, these groups would rely upon the posts for relief in times of need. Respected members of the North West Mounted Police were also present at the Treaty ceremony. Viewed as honourable, trustworthy protectors sent by the Crown, these men had fought off American free traders from the south and 'fur miners' from other areas which, left unchecked, would surely have decimated the local economy of the groups.[15] Finally, there were the missionaries—whom the Indians had long trusted as friends and allies—which were now called to service by their Crown to serve as interpreters and advisors or simply to lend cogency to the process. Even Father Lacombe was present at the signing of Treaty 8 in Lesser Slave Lake, called out of retirement at the age of 72 by the Prime Minister of Canada himself. Evidence reveals that in later years some of the hand-picked witnesses and advisors that had taken part in the Treaty negotiations felt used after reflecting on their involvement with the 'negotiations', as this letter from Constant Falher to Bishop Breynat illustrates (Fumoleau 1973:67):

> If in 1899 we had not prepared the Lesser Slave Lake people to accept a treaty with the government; if Bishop Grouard had not advised the chiefs to sign the treaty, telling them there was nothing which was not to their advantage; the treaty would still be waiting to be signed today. When Bishop Grouard sent me to Wabasca (at the request of Mr. Laird) to prepare the people and calm them, (it was then said that they were more or less in a state of revolt) I carried with me the Government promises, and I was very surprised when later on I was shown the document supposedly signed by the Indian Chiefs at Grouard [a village at the west end of Lesser Slave Lake] and thereabouts. So many important things are missing...*but we do remember these things and we suffer.*[16]

In addition to assembling this team of respected delegates, Treaty commissioners frequently used terms such as brother, mother and father. In a kinship-based society these terms imply solemn relationships based on trust. Great pomp and ceremony also accompanied the Treaty party wherever they went and the representatives of the Crown engaged in spiritual ceremonies such as the exchange of gifts or wampum and sharing the sacred pipe. From the Native perspective, the fact that these ceremonies were used in the meetings with the Crown signalled that the young government of Canada respected their independence as a people (Assembly of First Nations 1993:7-16).

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[15] For an interesting exchange of words between commissioner Morris and the Blackfoot (Treaty 7) on this issue see Morris (1971: 270-275). For example, at pp.270 Button Chief states "The Great Mother sent...the Police to put an end to the traffic in fire-water. I can sleep now safely. Before the arrival of the Police, when I laid my head down at night, every sound frightened me; my sleep was broken; now I can sleep sound and am not afraid."

[16] For additional oral testimony see generally Hickey *et al* (1999).

Given the constant assurances that their way of life would not be interfered with, it would also be the natural understanding of the Indians that whatever white settlement or development did come into the area, it would be fully compatible with the status quo, or at least insignificant enough that it would be of little or no concern. Surely there was, and would continue to be an influx of white people and activity, but those activities and the lands required for them would not jeopardize the Indian way of life. Contact with white people would be more frequent, but serious land use conflict would be less frequent. From time to time a fence or a building may alter a trap line or hunting area; however, these changes would be at a level or intensity that would allow the Indians to adapt to them and work around them. This arrangement was fully compatible with previous understandings of sharing with outsiders (Daniel 1999:49):

> Resources were not only shared with members of a band, but to some extent with outsiders as well. Even non-Indians were accepted, provided that they behaved decently and did not threaten the Indian way of life. This easy acceptance of outsiders allowed the fur trade to establish posts throughout the area with no initial hostility. However…other incursions of whites into Indian land were seen as threats to the Indian people and were resisted.

From this perspective, the written text of the treaty makes sense in mentioning both sides to the equation (Treaty No. 8):

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

Indians at the negotiation of Treaty 8 would be greatly comforted that regulation and settlement were discussed and written together with subsistence rights, for this would appear to acknowledge the caveat upon white activities—that they must occur in such as way as to ensure the "usual vocations" of the way of life of the Indian.

Earlier in this paper, the intrinsic value of the forest to the LRRCN way of life was outlined. It was shown that hunting, trapping, fishing, and gathering are central to the cultural sustainability of LRRCN and that land management and resource development decisions have the potential to affect the ability of LRRCN culture to perpetuate itself and remain responsive to social, political, economic and environmental changes. It was concluded that the symbolic and material values of subsistence harvesting are linked and cannot be maintained in any meaningful way without one another. The forest is the

ecosystem that facilitates the performance of these activities and in this sense, is a lifeline for the cultural sustainability of the LRRCN people. Without the forest, the performance of these activities would be impossible. At the time of Treaty, the Crown ensured that these "usual vocations" central to the way of life of the LRRCN would continue. Translated into a modern conceptual framework, the expectation of the LRRCN at the time of Treaty would be that the forest would be maintained in a sustainable way with due consideration for the activities and rights of the LRRCN. Given the assurances of the Crown that the way of life would continue "as formerly" and the clear motivation of the Crown to ensure the viability of subsistence for the Indians for financial and other reasons, it would also appear that the Crown was under a similar expectation. The common intention of the parties was therefore to ensure the way of life of the Indians would continue, and necessarily, that the forest would be managed in such as way as ensure that these promises made in the Treaty would be kept and the honour of the Crown maintained: sustainable forest management.

The British colonial policy of Treaty making is recognized in the *Royal Proclamation, 1763* (R.S.C. 1985, App. II, No.1), which provided assurances to Indian Nations that their lands would not be unfairly expropriated from them. Negotiation with the Crown would occur for the surrender of Indian title, when necessary. Indian peoples would not be molested or pushed off their lands or forced to leave their traditional territories. There is the general understanding that development and settlement may be coming, but there is a commitment made on the honour of the Crown that this development would happen in a sustainable way and with consideration of Indian interests. It was recognition that development would consider and make provision for the rights of Indian peoples who inhabited the lands before non-Natives. The *Royal Proclamation, 1763* was the precursor to Treaty and should be understood as a presumption of First Nation rights and as well as a recognition of a way of life—it was a commitment to the cultural sustainability of Indian Nations.

In an impressive dissent in *R. v. Van der Peet* (2 S.C.R. 507 [1996]), McLachlin JJ. (as she then was) brings clarity to some of these difficult concepts. According to McLachlin JJ., a fundamental understanding or the "Grundnorm of settlement in Canada" (para.272) can be summarized in two simple principles (para.275):

> The first was the general principle that the Crown took subject to existing aboriginal interests in the lands they traditionally occupied and their adjacent waters, even though those interests might not be of a type recognized by British law. The second, which may be viewed as an application of the first, is that the interests which aboriginal peoples had in using the land and adjacent waters for their sustenance were to be removed only by solemn treaty with due compensation to the people and its

> descendents. The right to use the land and adjacent waters as the people had traditionally done for its sustenance may be seen as a fundamental aboriginal right. It is supported by the common law and by the history of this country. It may safely be said to be enshrined in s. 35(1) of the Constitution Act, 1982.

What is interesting in the Alberta context is that although the numbered Treaties do propose to extinguish title to the land, they do not propose to extinguish the fundamental Aboriginal right to, in McLachlin JJ.'s words, "use the land and adjacent waters as the people had traditionally done for its sustenance". In fact, Treaty 8 clearly recognises and entrenches continuing rights of hunting, trapping and fishing throughout the traditional lands described by the Treaty area, outside of the boundaries of Indian reserve lands. Through the *Natural Resources Transfer Agreement, 1930* (*Constitution Act, 1930*, 20-21 George V, c. 26 (U.K.)) parliament and Alberta expressly extended the geographic scope of these off-reserve subsistence activities to encompass the entire province (*R. v. Badger*, 1 S.C.R. 771 [1996]). It is meaningful that habitat protection and sustainable development are at the heart of the promises made under Treaty 8. The expectation of Native signatories was that their rights would be maintained and protected by the Crown, regardless of administrative or constitutional shuffling of powers. Treaty 8 was not an anomaly in the long history of Crown-aboriginal relations in Canada; rather, it was a continuation of long standing principles of reconciliation, mutual understanding, and recognition of the importance of fundamental Aboriginal rights to use lands in ways they had done for centuries. These principles assured that although development and settlement may come, those activities would be balanced fairly with the land based rights and activities, and thereby the cultural sustainability, of Aboriginal people.[17] Nothing less would uphold the honour of the Crown using the rules of interpretation for Treaty set out by the Supreme Court.

2.6 The 'Special Trust' Relationship

Both Treaties and the *Royal Proclamation, 1763* may themselves be a recognition and a manifestation of a special trust relationship between the Crown and Indian Nations which, subsequently has been recognised as having fiduciary qualities. These instruments, the promises made in and through them and the reasonable expectations precipitated by them

[17] Bartlett (1990) similarly suggests that Treaties are ultimately a mechanism used by the Crown to reconcile the Crown with a pre-existing Aboriginal societies while clarifying vague Aboriginal rights by converting them into more tangible Treaty rights, which could then be recognized and protected by the Crown. Reserves established under Treaty created a homeland for Aboriginal peoples where traditional ways were maintained while opportunities for training in agriculture would occur.

should therefore be understood and interpreted in the light of this special relationship. This precept was exemplified in the case *Ontario (A.G.) v. Bear Island Foundation* (2 S.C.R. 570 [1991]). In *Bear Island*, the Supreme Court of Canada rejected Aboriginal rights claims forwarded by the Teme-Augawa Anishnabay and the Temagami because the claimant's ancestors were signatories to the Robinson-Huron Treaty, which exchanged the surrender of rights for annuities and a reserve. However after reviewing the terms of the Treaty the Court also found that by failing to discharge its undertakings outlined therein the Crown had breached its fiduciary duty to the Teme-Augawa Anishnabay and the Temagami.[18]

In *R. v. Marshall* (3 S.C.R. 456 [1999]) a majority of the Supreme Court also endorsed a much earlier Court statement as to the nature of the fiduciary obligation with respect to Treaty undertakings outlined in *Ontario v. Dominion of Canada and Quebec: In Re Indian Claims* (25 S.C.R. 434 [1895] at paras. 534-535):

> ...what is contended for and must not be lost sight of, is that the British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indian nations or tribes in their province of Canada, for the cession or surrender by them of what such sovereigns have been pleased to designate the Indian title, by instruments similar to these now under consideration to which they have been pleased to give the designation of "treaties" with the Indians in possession of and claiming title to the lands expressed to be surrendered by the instruments, and further that the terms and conditions expressed in those instruments as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown.

A similar conclusion was reached more recently in *Cree Regional Authority v. Robinson* (4 C.N.L.R 84 [1991]).[19] This case concerned an action that sought to order a federal administrator to comply with federal environmental and social impact assessment review procedures in the James Bay and Northern Quebec Agreement and the *James Bay and Northern Quebec Native Claims Settlement Act* (R.S.C. 1976-77, c32) with respect to the

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[18] It is important to note, however, that breach of Treaty does not always constitute a fiduciary breach. For example, in the recent case of *Beattie v. Canada* (3 C.N.L.R. 18 [2004]) the plaintiffs (several treaty Indians who were direct descendents of original adherents to Treaty 6 and 11) claimed that fiduciary standards should be employed to calculate annuity arrears held, invested or otherwise administered for the benefit of Treaty Indians (para 74). However, in its analysis of the case the Court determined that context is important in consideration of when and how the fiduciary requirements on the Crown should be interpreted and administered (paras 77-78). In the context of the case at bar, the Court noted that although the actions of the Crown may be deemed a breach of Treaty, they did not constitute a necessary breach of fiduciary duty because the Crown had no element of discretion in the largely administrative role of annuity payment under Treaty. Below, I discuss these concepts in greater detail, and illustrate that even where a fiduciary relationship exists between the Crown and an Aboriginal group, this relationship does not exist at large but is rather *sui generis* and very much dependent upon specific interests, context, discretion and the unique requirements of reconciliation.

[19] The decision was later overturned by the Court of Appeal.

Great Whale River Hydroelectric Project in Quebec. The agreement provided for two independent environmental assessments; one provincial and one federal. However, both Crowns decided that two independent assessments would be redundant and expensive. Instead, they determined that one joint assessment should be conducted. Addressing the obligation of the 'Crown' to Aboriginal people, the trial judge states (para. 105-106):

> In light of the fiduciary obligation imposed upon the federal government in its dealing with the Native population, I perceive no ambiguity: the Agreement mandates the protection of the Aboriginal people who relinquished substantial rights in return for the protection of both levels of government. Crown counsel also point out to me that *Sparrow*, supra, does not distinguish between the federal and provincial Crown; that the provincial authorities are also responsible for protecting the rights of the Native population. I agree.

The nature of the fiduciary relationship between the Crown and Native people will be developed in greater detail later; however for now it is important to realize that documents which define the relationship between the Crown and Indian peoples are much more than pieces of paper. They are solemn documents created in a relationship that has been characterized by the Supreme Court as being fiduciary in nature. In relation to forest management in Alberta, this may mean that policy, allocation, resource development and land management decisions and processes (including First Nations consultation) should be influenced and interpreted using equitable principles, where appropriate.[20]

Both the *Proclamation* and Treaty 8 create some rights while recognizing others, and simultaneously confirm, elucidate and are interpreted with respect to the nature and requirements of the special relationship existing between its Crown and Aboriginal signatories. Given these things and in consideration of the mutual intention of the Crown and First Nations in making Treaty 8, these documents should be perceived as having the combined intention of opening up the land for settlement while simultaneously recognizing and entrenching certain integral activities of Aboriginal groups so as to ensure and maintain those activities will continue. They were recognition of an Aboriginal way of life. They were manifestations of solemn promises made upon the honour of the Crown that the cultural sustainability of First Nations would not be needlessly compromised. They should be interpreted as constituting a fundamental principle, a broad commitment, that development and settlement would occur in a sustainable way, with due consideration for the rights and interests of First Nations through negotiation and consultation.

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[20] Of course, this is pending the application of the fiduciary relationship to the province of Alberta, which will be explored below.

2.7 International and National Developments/Commitments

Recent international and national developments have similarly recognized certain fundamental principles with respect to sustainability and the need for Aboriginal involvement in land management decisions. In 1987, the World Commission on the Environment and Development released a report entitled *Our Common Future* (also known as the Brundtland Report) which outlined the following key criteria for sustainable development:

- Satisfies the needs of the present without compromising the ability of future generations to meet their needs;
- Initiates processes of change in which the exploitation of resources, direction of investments, orientation of technological development, and institutional change are made consistent with future, as well as present needs;
- Enables societies to meet human needs both by increasing productive potential and by ensuring equitable potential and opportunities for all; and
- Defines economic growth in terms of the limits of regeneration and natural growth.

In 1992, the United Nations Conference on the Environment and Development (UNCED) held in Rio de Janeiro began to flesh out some of these more broad commitments. The following summaries of key principles illustrate recent international commitments made concerning Indigenous peoples and the link between sustainable development and cultural survival (condensed from Smith 1998:327):

- *The Rio Declaration principle 22*: Indigenous peoples have a vital role in environmental management and States should encourage their participation in sustainable management.

- *Agenda 21, Chapter 26, clause 26.1*: Because of the inter-relationship between Indigenous peoples and the environment, national and international efforts to implement sustainable development should involve these communities.

- *Biodiversity Convention, Article 8(j)*: Traditional knowledge is valuable, should be preserved, and Indigenous peoples should share in the benefits of its application.

- *Statement of Forest Principles, Element (5a)*: Forest-based Indigenous communities derive both cultural and material value from the forest and should share in the benefits of sustainable forest development.

- *Statement of Forest Principles, Element (13d)*: Traditional knowledge is valuable and should be recognized and incorporated into planning and regulatory structures.

The Canadian Council of Forest Ministers has also identified several criteria and indicators meant to guide and report on sustainable forest development in Canada, that have direct

application to many Aboriginal communities within Canada (Canadian Council of Forest Ministers, 1997):

> 6.1.1 – Extent of consultation with Aboriginals in forest management planning and in the development of policies and legislation related to forest management.
> 6.1.2 – Area of forest land owned by Aboriginal peoples
> 6.2.1 – Area of forested crown land with traditional land use studies
> 6.3.1 – Economic diversity index of forest-based communities
> 6.3.2 – Education attainment levels in forest-based communities
> 6.3.3 – Employment rate in forest-based communities
> 6.3.4 – Incidence of low income in forest-based communities

The *Canada Forest Accord, 1998-2003* similarly has the following Aboriginal-specific commitments in relation to forest management under "Commitments to Action":

- Enabling the forest and forest-related workforce to contribute fully to, and benefit from, sustainable forest management opportunities, and improving the capabilities of forest dependent communities to develop and diversify their economies.
- Recognizing and making provision for Aboriginal and Treaty rights, ensuring the involvement of Aboriginals in forest management and decision-making, consistent with these rights, supporting the pursuit of both traditional and modern economic development activities, and achieving sustainable forest management on Indian Reserve Lands.

Canada's *National Forest Strategy, 1998-2003* (to which Alberta is signatory) is also clear in its commitment to Aboriginal People. The following summary is reiterated from the "Principles" section of the *Strategy*:

> Aboriginal peoples have an important and integral role in forest policy development, planning and management. Forest management in Canada, therefore, must recognize and make provision for Aboriginal and Treaty rights and responsibilities, and respect the values and traditions of Aboriginal peoples regarding the forests for their livelihood, community and cultural identity.
>
> To address their legitimate needs and aspirations, Aboriginal communities require greater access to forest resources, and an increased capacity to benefit from forests in their areas of traditional use and Treaty areas, and to contribute to their management.
>
> Honourable, fair and timely resolution of land claims, modern treaties and Aboriginal self-government is necessary in order to create a stable environment for sustainable forest management.
>
> - We will ensure the involvement of Aboriginal peoples in forest management and decision-making, consistent with Aboriginal and Treaty rights
> - We will recognize and make provision for Aboriginal and Treaty rights in sustainable forest management:
> - We will increase access to forest resources for Aboriginal communities to pursue both traditional and economic development activities

- We will support Aboriginal employment and business development in the forest sector
- We will increase the capacity of Aboriginal communities, organizations and individuals to participate in and carry out sustainable forest management
- We will achieve sustainable forest management on Indian Reserve lands

Forest certification has also grown in popularity across Canada, and several frameworks have emerged which make specific efforts to incorporate Aboriginal use and rights in management decisions. For example, the Forest Stewardship Council of Canada (FSC) notes (FSC 2004:3):

> 3.0 The Legal and customary rights of [I]ndigenous peoples to own, use and manage their lands and territories and resources shall be recognized and respected.
>
> 3.1 Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies.
>
> 3.2 Forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of Indigenous peoples.
>
> 3.3 Sites of special cultural, ecological, economic or religious significance to Indigenous peoples shall be clearly identified in cooperation with such peoples, and recognized and protected by forest managers.
>
> 3.4 Indigenous peoples shall be compensated for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations. This compensation shall be formally agreed upon with their free and informed consent before forest operations commence.

These developments on an international and national level are not meant to be exhaustive. A detailed analysis of each of them would be far beyond the scope of this paper. However, read together these international and national developments reveal a recognition of certain fundamental principles—that development and settlement of lands and resources should occur in a sustainable way, with due consideration for the rights and perspectives of First Nations through negotiation and consultation. The similarity to the themes that emerge through an analysis of the Proclamation and Treaty 8 are obvious. The result that one would expect is that the combined effect of these factors would encourage governments in Canada to lead the movement towards increased Aboriginal participation in land planning and forest development decision making processes. Generally, this has not been the case; however, one response to these developments has been for governments in Canada to investigate and

experiment with new methods of involving First Nations in a more meaningful way in resource development and land use decisions. One of these methods has been to initiate cooperative management with Aboriginal peoples.

3. Cooperative Management

3.1 Background

Cooperative management is a way to involve diverse groups of stakeholders with differing perspectives and values in resource management and environmental decision-making (see Berkes 1998). The National Round Table on the Environment and the Economy (NRTEE 1998:14) defines cooperative management this way:

> ...co-management is a system that enables a sharing of decision-making power, responsibility, and risk between governments and stakeholders, including but not limited to resource users, environmental interests, experts, and wealth generators.

Key to this definition is the concept of the sharing of power and accountability. It includes devolution of power and a decentralization of decision-making authority. The concept is that when groups come together with diverse interests and make decisions jointly, this creates a mutual sense of responsibility and partnership, promotes buy-in and has the effect of empowering resource users who may have previously been left out of the decision making process (Pinkerton 1989). Basically, users are put in the same boat and are therefore less likely to want to rock that boat. Also, decisions of the group are also more likely to be implemented because the user groups on the land understand the rationale behind the decisions made (Pinkerton 1989).

The movement towards cooperative management with Indigenous peoples represents a significant paradigm shift in resource management where there has historically been a gap between formal governance structures and resource users. For example, in Canada management of wildlife resources has historically been grounded in certain principles which permeate decision making processes (adapted from Usher 1987:6):

1. Wildlife are incapable of private ownership, a common property resource. Animals must be captured in order to be possessed and access to animals is regulated for the common good by the state.
2. Management is the prerogative of the state and should not be delegated to or inundated with private interests. Allocation of wildlife resources proceeds on an economic and political basis.

This system of knowledge is based on the scientific accumulation, organization and interpretation of data. Problems are addressed in a technical, ahistorical framework. The foundation of this system of management is based in the Judeo-Christian belief that man has dominion over all things on earth and must exert his dominion in order to maintain good order and stewardship.

The Indigenous perspective with respect to wildlife differs greatly from this construct (adapted from Usher 1987:6):

1. The community is steward and owner of resources jointly and decisions are made by consensus. Users are managers.
2. Jointly held values determine acceptable use and allocation and social sanction ensures compliance.

The Indigenous view is grounded in the central concept that community is part of the environment, rather than external to it. In this sense the community does not manage the environment or even the uses of the resources in the environment. What the community is managing is their relationships to other things within an overall system, in which they are an integral part (Stevenson 1999:6; Erasmus 1989). Yet these are more than a collection of ideals or values, they constitute the core of what amount to stand alone and alternative management systems, which have undergone significant analysis and documentation (Usher 1987, 1993; Johnson 2002; Lewis and Ferguson 1988; Berkes 1999; Newell 1999; Drolet C. A. 1986).

The differences between the two ideologies are profound. Indeed, even the words "resource" and "management" by definition reveal the idea of superiority when these two terms are used together (Shapcott 1989:72). As Notzke (1994:1-2) notes, in most Aboriginal languages there is not even an equivalent term to define what 'resource management' means and many Aboriginal people are uncomfortable with its use because it has the connotation of having superiority over something on which they rely and of which they are a part. A similar semantic dilemma often emerges with respect to the understanding around what cooperative management or co-management of resources means at face value. To some, at face value it may be interpreted as an improved advisory process—to others it may be understood as shared jurisdiction, with some Native groups even considering it a consent-based process that leaves them with final authority on issues which are integral to their society (Cassidy and Dale 1988; Honda-McNeil 2000:118). Despite these divergent perspectives, in many cases the difficulties with attempting to graft the two ways of seeing the world have been outweighed by threat of a looming crisis in resource and land management in the larger society.

One reason why Indigenous management systems have grown in interest is that these systems often have the bi-product of creating biodiversity in ecosystems. Although not always an intentional goal of traditional people themselves, this result of their actions is globally prolific. For example, the routine burning of forest cover and brush by some groups has been described as a contributor to species variation and population management (Lewis

and Ferguson 1988:57-58). Likewise, shifting cultivation and fallowing resource areas are activities that contribute to biodiversity by changing the landscape and allowing for the penetration of many foreign species of plants and animals (Berkes 1999:89). Individual actions at the user level contribute to larger patterns of sustainability. In essence, Indigenous patterns of land use represent user-based "micro-management" systems that actually work. In fact, they work so well that it is now a policy requirement that traditional ecological knowledge (TEK) be incorporated into environmental assessment and resource management in Canada's north (Usher 2000:184).[21]

Cooperative management allows contemporary management practices based in western law and ideology to build upon rather than displace local knowledge and practice, in theory increasing the effectiveness of the management institution (Natcher 1999:52; Pinkerton 1989). Rather than yielding to claims that Indigenous and 'western' systems of management are mutually exclusive, cooperative management aims to take the best features of both systems and apply them to problems which neither system can solve alone (Usher 1987:9; Nowicki 1985). It also gives opportunity for the incorporation of local knowledge in contemporary management practices, which can have the effect of making the management strategy more responsive to the needs of local resource users, changes in the ecosystem, increasing compliance with rules and regulations and reducing conflict (McCay 1996; Pinkerton 1989; Berkes 1989; Honda-McNeil 2000). In this sense, cooperative management processes have the potential to bring an adaptive management component to existing management regimes (Berkes 1999).

In Canada, cooperative management has generally been employed in settlement of comprehensive claims with the aim to devolve government management of resources, incorporate TEK into land use management and initiate capacity building (Honda McNeil 2000). Provincial models have differed greatly in content and process, which is influenced by the intensity of resource use by First Nations, the legal force of the rights in question, political will to involve Aboriginal people in resource management and the legal, legislative and policy landscape within each jurisdiction (Natcher 2001). Given the variability in cooperative management structures, Berkes (1994) suggests an eight level typology, which is defined by the level of power sharing and devolution presented in the cooperative structure. Features of the typology are listed in descending order with the number eight representing the

[21] The opportunity for the incorporation of TEK into environmental assessment is also contemplated in s.13.1 of the most recent proposed draft changes to the *Canada-Alberta Agreement for Environmental Assessment Cooperation, 1999.*

largest degree of control and one representing the least degree of control. This typology may be condensed as follows:

8. Community Control (Indigenous people retain full power and discretion)
7. Partnership (decisions are made jointly through dialogue with Indigenous people)
6. Management Boards (Indigenous and state members share representation on a board which retains full and final discretionary authority to manage resources)
5. Cooperation (mutually agreed upon cooperative principles guide dialogue and consensus-based management decisions of varying influence)
4. Regional Councils-Advisory Boards (boards of varying function and composition which make recommendations to a statutory decision maker who retains authority)
3. Communication (ongoing two-way dialogue which may result in change to management plans)
2. Consultation (temporary two-way communication which may result in changes to management plans)
1. Informing (one way sharing of information about management plans)

At the top of the spectrum exists a structure which effects full community control; at the bottom, only token consideration in the dissemination of information.

In Canada, most cooperative management agreements signed with Aboriginal groups fall somewhere in the middle of this spectrum and emerge due to 1) comprehensive claims settlements 2) Court direction or 3) wildlife crises (Honda McNeil 2000:88). In Alberta most agreements similarly fall within the middle of the spectrum; however, agreements in Alberta are also unique in that they have been used as a vehicle for consultation as opposed to being formed under the more common and established categories observed nationally (Honda-McNeil 2000:88). It is also noteworthy that cooperative management processes in the provinces have generally allocated less power and devolved less authority to Aboriginal people than those developed in the northern territories (Honda-McNeil 2000). This is largely because of strong provincial assertion of jurisdictional authority over resources entrenched in section 92 of the *Constitution Act, 1982* and a corresponding reluctance to consider a First Nation's role in the management of lands and resources existing outside reserves where rights and traditional uses are practiced (Campbell 1996:130). This reluctance is heightened in Alberta, which is covered by 'land cession' Treaties and the *Natural Resources Transfer*

Agreements, 1930 which purport to entrench Crown authority over lands and resources around reserves (Statt 2003).

3.2 The LRRCN MOU

In the early 1990s the LRRCN resolved to undertake a 'cooperative management' approach with Alberta. LRRCN turned to cooperative management as a way to regain some measure of control over their traditional territories while simultaneously stimulating new economic opportunities that may complement traditional use and reliance on the land for sustenance. Alberta looked to cooperative management to address several of the international and national commitments and developments outlined above, including creating sustainable Aboriginal communities and ecosystems, involving Aboriginal communities in land use planning and incorporating traditional knowledge into management structures (McNeil 2000; Natcher 1999; Nelson 2003).

By the mid-1990s a relationship with Daishowa-Marubeni Inc. and LRRCN and TCFN was formed whereby First Nation-held forest tenures would supply timber needs to the forest corporation. In turn, this First Nation and Industry partnership recommended that the provincial Crown enter into a formal cooperative management planning process with the LRRCN and TCFN. In 1995 LRRCN, Tallcree First Nation (TCFN) and Alberta entered into a Memorandum of Understanding Cooperative Management Plan (MOU) (Appendix 1). Under the terms of this MOU, a Cooperative Management Planning Board was created with the mandate to conduct a sub-regional integrated resource management planning process for a 35,000 square kilometre special management area (SMA) situated within the lower Peace River watershed. The whole of the SMA in enclosed within the geographic area demarked by Treaty 8. This management area consists of 1) a 10,000 square kilometre boreal sub-arctic plateau (within which a 6000 square kilometre protected area has been created) and a 2) 25,000 square kilometer boreal forest landscape, bordering on Wood Buffalo National Park on the west and south.

Within the second, larger area the First Nations hold forest tenures over eight Provincial forest management units (FMUs). Of these FMUs, F2, F3, F4, F5 and A9 are located to the south of the Lower Peace River while F6, F7 and F10 are located to the north of the Lower Peace River.[22] The MOU is considered to be very innovative in a variety of

[22] The FMUs in F2, F5, F7 and F10 were added to the SMA described in Appendix B of the 1995 MOU by way of a letter of intent dated September 5, 1996. Reference to the 1995 MOU will heretofore include the changes invoked by the 1996 letter of intent.

ways including the level of integration between the parties and its resource management scope (Ross and Smith 2002). It is hoped that the 25,000 square kilometre area will ensure sustainable economic development while the protected area will maintain the way of life of the First Nations (E. Krcmar *et. al.* 2003:2). In 1999, the 1995 MOU was renewed and the commitments therein reaffirmed and clarified (Appendix 2).[23] This MOU expired on March 31, 2001 and, although it is the subject of passive negotiation, it is currently in a dormant state.

LRRCN and TCFN hold tenure under the auspices of several holding companies, which include Little Red River Forestry Ltd., Little Red River Askee Ltd., Tipemso and Netaskinan. The current Annual Allowable Cut (AAC) for the region is over 900,000 cubic meters and logging continues to be the main industrial resource extraction activity in the SMA (Ross and Smith 2002). Under the 1995 agreement, a commitment was made for Tolko Industries Ltd. and the First Nations to conduct joint planning and management of forestry operations in the 6 FMUs (F2, F3, F4, F5, F6 and F7) and to use coniferous timber from FMUs F2, F5 and F7 to feed the Tolko mill in High Level (Krcmar *et. al.* 2003:3). There is also a recent volume agreement between the LRRCN and Footner Forest Products Ltd. to supply deciduous fibre to a new oriented strand board (OSB) mill (Krcmar *et. al.* 2003:3). In 2001, the OSB mill was producing 1 billion square feet annually using 1.2 million cubic meters of aspen while the Tolko mill was utilizing approximately 1 million cubic meters of softwood timber for its operations (Kryzanowksi 2001).

In the 1995 MOU a Planning Board is established to guide planning and management of resources in the SMA. The Board is central to the success or failure of any cooperative management framework. In fact, it is generally accepted that cooperative management systems are only as good as the boards charged with implementation of the terms of agreements (NRTEE 1998:25). The Board created under the 1995 MOU included three representatives from Alberta, three from LRRCN, two from TCFN and one representative from the Municipal District of MacKenzie #23. With the power to make recommendations regarding all renewable natural resources within the SMA, the Board has opportunity to influence actions of the provincial Crown in the SMA by providing policy guidance for resource allocation and use decisions in the SMA and resolving resource use conflicts within the SMA (Webb 2000:2). Although non-renewable resource impacts and planning (i.e. oil

[23] Appendix 1 of the 1999 MOU states "Alberta and the First Nations agree and commit themselves to fulfil and honour all those outstanding obligations contained in the MOU of May 1995, as amended by the Letter of Intent dated September 5, 1996, and which are not specifically modified by the terms of this agreement..."

and gas deposits) are outside of the mandate of the planning mandate of the Board, the surface impacts of oil/gas exploration, development and operations on renewable natural resources are within its mandate (LRRCN 2000d:5). Under the 1999 MOU the composition of the Board was expanded and included three representatives from Alberta, three from LRRCN, two from TCFN, one from Municipal District of Mackenzie No. 23, one from Daishowa-Marubeni International Ltd., one from Footner Forest Products Ltd., one from Askee Development Coorporation and one from Netaskinan Development Corporation. The changes to the Board in 1999 reflect a commitment to involve interested parties in the decision making process in a rapidly changing resource management environment in the SMA and an overall maturing and adaptive quality of the administrative process under the MOU.[24]

The Board is empowered to determine its own practices, procedures and processes (subject to agreed upon operational guidelines). Decision-making processes of the Board are consensus based. One unique aspect of the LRRCN and TCFN MOUs is the provision for what appears to be recognition of First Nations priority, perhaps owing to the constitutional nature of their rights and interests in the SMA. Where the Board cannot come to consensus on a decision, the MOUs allow decisions to be made by a majority vote of the Board which must include a majority of First Nation Board members. LRRCN has summarized the two main goals of the Board as follows (LRRCN 2000d:5):

1. to undertake a "Landscape Assessment" related to management and use of renewable natural resources including:
    a. Environmental aspects related to eco-system integrity, biodiversity and landscape patterns and structure;
    b. The presence of endangered, threatened or rare species of flora and fauna;
    c. Economic aspects related to resource values, current resource uses, potential future resource uses, development costs and opportunity costs associated with the prescribed resource uses;
    d. Social aspects related to the value of renewable natural resources from a First Nation perspective; and
    e. Integration of ecological, economic and social aspects related to planning and management responsibilities within the SMA;

[24] Article 3 under the 1999 MOU and Phase two of the 1995 MOU reiterate the adaptive component of the Board's composition, acknowledging that from time to time representatives from other industries, non-governmental organizations, special interest groups may be invited to participate in the cooperative planning process. Indeed, in 2000 a member of the Canadian Association of Petroleum Producers accepted a seat on the Board with a representative from Paramount Resources acting as an alternate. Both MOUs also recognise the necessity of multi-stakeholder input and public consultation into the planning process and commit to creating a process for stakeholders to interact and act as advisors to the Board, creating a mechanism for public comment and that from time to time experts may be consulted to aid the Board in making recommendations.

2. to develop, as a recommendation to the Ministers, a "Resource Management Philosophy and Goal Statement", intended to guide the management and use of renewable natural resources within the SMA. This statement will:
    a. recommend resource-use priorities which are compatible with sustainable development and traditional use of the SMA by LRRCN/TCFN;
    b. recommend objectives and guidelines for management and use of renewable natural resources;
    c. identify economic development, employment and training opportunities and initiatives for LRRCN/TCFN within the SMA; and
    d. identify special initiatives to address First Nation concerns regarding management of wildlife and wildlife habitat within the SMA.
    e. Development of renewable resource mechanisms or processes which are required to implement this integrated resource management process;
    f. Development of administrative or contractual relationships which are required for implementation; and
    g. Amendments to regulations, policies or laws which are required for implementation.

From this summary it is apparent that the role of the Board is an advisory one, with the Board itself in a reporting role to the Ministry of Environment. Hence, on Berkes' typology of cooperative management boards, the Board established under the LRRCN MOU is at best a 4 or a 5.[25] This is recognised in the MOU (Appendix 2) at article 6.1 and 6.2 where the MOU notes that "Ministerial discretion can not be fettered. The Board shall report to the Minister of Environment and the Minister has final decision making authority on matters within provincial jurisdiction."[26]

3.3 Contextualizing the MOU

Reduced to its most basic function, the role of the Board in the cooperative management planning process is to make recommendations on the development of renewable resources in the SMA that promote ecological sustainability. But ecological sustainability cannot be wholly separated from other considerations. LRRCN and TCFN are proceeding on the perspective that ecological sustainability and cultural sustainability are inseparable,

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[25] Refer to section 3.1 for a more detailed analysis of Berkes' typology.

[26] Even the "Philosophy and Goal Statement" devised by the Board is subject to the approval of the Minister, with the substantive product of the Board being "advice and recommendations". This may also represent the greatest challenge to the viability of cooperative management in Alberta. Power ultimately remains in the hands of the Minister charged with the management of public lands. The advice of the Board may fall on deaf ears and the recommendations of the Board may never be implemented. Further, there is no formal requirement to provide an explanation of how or why the advice and concerns of the Board were or were not taken into account.

because they continue to use the lands in the SMA for food, medicine and cultural identity (Hickey *et. al.* 2004:2). This is understandable considering that sufficient habitat is needed for the performance of hunting, trapping and fishing rights; sacred sites exist on the land; medicines are borrowed from the land. Language, ritual and spirituality are intertwined with the rights and activities practiced in the forest. Interestingly, the MOU does consider these things.[27] In this sense the intentions of the LRRCN MOU are reminiscent of the mutual intentions of the Crown and First Nations in making Treaty 8 and the purpose of the *Royal Proclamation, 1763*—development and settlement would happen in a sustainable way with special consideration for Indian interests.

The reason for this is less likely a profound iteration of the honourable intentions of the past than a reiteration of the challenges of the past. Nevertheless, the similarities are evident. There may now be a different manifestation of the Crown interacting with LRRCN on lands and resources, but the issues are the same. Lands and resources are desired for development, but the lands and resources desired are burdened with rights and cultural activities that constitute the way of life of First Nation people. But that may be where the similarities end. This is because the obligations of the federal Crown have been held to be fiduciary in nature, forming a key part of the special *sui generis* relationship between the federal Crown and native peoples in Canada. This of course begs the questions, what are the obligations of Alberta with respect to LRRCN in the management of the forest? Are Alberta's obligations fiduciary in nature, like the federal Crown's duties toward First Nations? Are Alberta's met in the LRRCN MOU?

To understand the nature and scope of the obligations Alberta may have toward LRRCN and to see if the MOU meets those obligations, the nature of those obligations must be examined in more depth. Below I attempt to frame the nature of the obligations that may be owed by the Alberta Crown with respect to LRRCN. To do this I will conduct an in-depth examination of the nature of 'general' or 'traditional' fiduciary relationships; how fiduciary law has been applied to the *sui generis* federal Crown-Native relationship in Canada and the nature of the obligations arising from this *sui generis* fiduciary duty; what the Courts have said the principles of consultation and accommodation are; how the *sui generis* duty might be applied to provincial Crowns and; what that duty might look light in an Alberta-LRRCN context in terms of what the nature and scope of those duties might be. Once I have defined

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[27] The 1996 MOU seems to recognise this reality in the second 'Whereas' clause: " WHEREAS Alberta and the First Nations recognize that resource management based upon the principle of sustainable development requires an integrated approach, taking into account the delicate balance between First Nations traditional or cultural uses with the rights of use enjoyed by non-natives…"

the provincial Crown's duties with greater accuracy I will evaluate whether the LRRCN MOUs fulfil those duties.

4. The Duty to Consult

4.1 Source and Trigger

Possible sources forwarded for consultation duties have included statutory provision, policy, agreement, court-imposed requirements, natural justice and procedural or administrative fairness, the honour of the Crown, historic and general fiduciary duties of the Crown, specific fiduciary duties, Treaty and s.35(1) of the *Constitution Act, 1982*. However, the recent cases of *Haida Nation v. British Columbia (Minister of Forests)* (SCJ No. 70 [2004]) and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (SCJ No. 69 [2004]) have begun to clarify the source and trigger of consultation.

In *Haida*, the Supreme Court clearly identifies that the "duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown" and notes that "the honour of the Crown is always at stake in its dealing with Aboriginal peoples…[i]t is not a mere incantation, but rather a core precept that finds its application in concrete practices" (para. 16). In *Taku*, the Supreme Court states (para. 24):

> …the duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s.35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

S. 35(1) is a "promise of rights recognition" and "…this promise is realized and sovereignty claims reconciled through the process of honourable negotiation [which] in turn implies a duty to consult, and, if appropriate, accommodate" (*Haida*, para. 20). These statements clearly denote consultation as a key tool used in the broader process of reconciliation. In terms of when the duty is triggered, the Supreme Court again brings welcome clarity to the situation in *Haida* (para. 34):

> But, when precisely does as duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation, suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. [references omitted]

The formula is simple: the honour of the Crown both necessitates the use of consultation, guides its nature and content and informs when it should be used. Consultation is required when existing or potential rights may be affected by Crown actions and the spheres of Crown sovereignty and Aboriginal interests overlap and need to be reconciled. Yet the Supreme Court also specifies that reconciliation is not a terminal illness, nor is it a spectator sport (para. 32):

> ...the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense...[it] flows from the Crown's duty of honourable dealing toward Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.

The Supreme Court in *Haida* does not promote a cookie-cutter approach as to how the honour of the Crown is understood or discharged in a given situation (para. 18):

> The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty... The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising the specific Aboriginal interest at stake.

In *Haida* the Court made clear that in a pre-treaty context, unproven rights and title were insufficient to trigger a fiduciary duty (para. 18). However, even unproven rights were still capable of requiring the performance of some aspects of the honour of the Crown towards Aboriginal people, including the duty to consult, and where appropriate, accommodate the affected Aboriginal groups (*Taku*, para. 25; *Haida*, para. 25).

The broader expectation that the honour of the Crown will be upheld is the benchmark by which all other considerations will be surveyed (*Haida*, para. 41). Yet the requirements of the honour of the Crown vary with circumstance (*Taku*, para. 25), the activation of the fiduciary duty varies with context (*Haida*, para. 18), and the duties of consultation and accommodation are not uniform in each situation (*Haida*, para. 39). The expectation that honour will be upheld is static, but the way that the honour of the Crown is discharged is variable.[28]

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[28] In section 4.4 I will illustrate that despite that variability of the requirements to discharge the duty of honour that is incumbent on the Crown, there are certain precepts or 'maxims' which may be drawn from the case law on consultation. These maxims themselves are precipitated largely by reference to the honour of the Crown more generally.

In *Haida* (para. 39) the Supreme Court clearly endorses the concept that the "...scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed". Citing the concept of the spectrum fleshed out in *Delgamuukw* (para. 40) and applying that concept to a pre-proof context, the Supreme Court delineates the following (para. 43-45):

> ...At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised is response to the notice...At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision...Between these two extremes of the spectrum just described, will lie other situations...

At the deepest end of the spectrum, the Court describes another stage which may be required—accommodation (*Haida*, para. 47):

> Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation...

The focus in *Haida* is unproven rights, which clearly lack the specificity necessary to trigger the fiduciary component of the honour of the Crown. Where claims or interests are already proven the requirements on the Crown may be more intense and the requirements of the spectrum may be supercharged. For example, in *Delgamuukw v. B.C.*, (3 S.C.R. 1010 [1997]), where claims are established, the Supreme Court has noted that "[s]ome cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands" (para. 168).[29]

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[29] It is important that the application of the consent provision is problematic in the Alberta context. This is because in *Delgamuukw* the provision was directed at enacting hunting and fishing regulations in the context of 'Aboriginal lands'. In Alberta, the only Aboriginal lands are reserve lands set apart under Treaty and these lands are not under the jurisdiction of the province.

The yardstick that should be used to determine the requirements incumbent upon the Crown is clearly defined by the Supreme Court in *Haida* (para. 45): "the controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake". For this reason the rights and provisions described in the Treaties covering Alberta should be given special consideration. Treaty 8 was solemnly negotiated with the Crown and by the Crown's own written terms and interpretation of the Treaty, title to lands was ceded for special Treaty rights and privileges. There is no higher form of specificity for rights than those negotiated with the Crown. Further, the honour of the Crown "infuses the processes of treaty making and treaty interpretation and in making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of 'sharp dealing'" (*Haida*, para. 19). The peaceful negotiation of Treaty 8 was a key component in the process to "effect" the reconciliation of Treaty 8 First Nations and the Crown. The maintenance of the honour of the Crown shifts from reconciling Aboriginal title to implementing its "promises" made in the Treaty itself, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*R. v. Badger*, 1 S.C.R. 771 [1996] at para. 41). Of course, given that "reconciliation" is an ongoing process, and the Crown has rights under Treaty 8 to take up lands from time to time,[30] the Crown will not be in breach of Treaty every time Treaty rights are potentially impacted by its actions. In these situations, consultation and/or accommodation will again provide a means by which the honour of the Crown can be maintained, while balancing the interests of others.

Given that Treaty 8 rights were solemnly negotiated with the Crown and therefore have the highest level of certainty, it follows that these rights are sufficiently specific "for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title" (*Haida*, para. 18).

If the fiduciary component of the honour of the Crown is activated in a Treaty 8 context, this has implications for consultation with Treaty 8 First Nations. The content of the duty may be expanded and the requirements on the Crown may be more strenuous, perhaps with a greater degree of responsiveness necessary to meet the duty. On the spectrum described above, this would mean that content of the duty may move beyond the minimum of notification and good faith negotiation with the intent of substantially addressing concerns, up

[30] As discussed in section 2.3 above.

the spectrum to a more regular application of accommodation through minimal interference and taking steps to avoid irreparable harm.

4.2 Alberta's Legal Perspective

Alberta has argued consultative requirements arise solely from a narrow construction of justificatory test presented in *Sparrow*. It is therefore dependent upon actual infringement of established Aboriginal or Treaty rights recognized and affirmed in s35 (1) (Factum of the intervener Attorney General of Alberta, *Taku River*, Court File No. 29146 at para. 4). In Alberta's view, Aboriginal rights do not exist in the province because the province is covered by the "land cession" Treaties of No. 4, 6, 7, 8, and 10. There is no possibility of infringement of Treaty harvesting rights (and therefore no need for consultation) in Alberta because the Crown right to take up lands and to regulate hunting, fishing and trapping for conservation purposes is affirmed in the Treaties (Factum of the intervener Attorney General of Alberta, *Haida*, Court File No. 29419).[31] Alberta relies on a line of authority as exemplified in *Transcanada Pipelines Ltd. v. Beardmore (Township)* (O.J. No. 1066 [2000] at paras. 119-120):

> In my view, what these cases decide is that the duty of the Crown to consult with First Nations is a legal requirement that assists the court in determining whether the Crown is constitutionally justified in engaging in a particular action that has been found to prima facie infringe an existing Aboriginal or treaty right of a First Nation. It is only after the First Nation has established such infringement through an appropriate hearing that the duty of the Crown to consult with First Nations becomes engaged as a factor for the court to consider in the justificatory phase of the proceeding...As the decisions of the Supreme Court of Canada illustrate, what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s.35(1) of the *Constitution Act, 1982*. It is at this stage of the proceeding that the Crown is required to address whether it has fulfilled its duty to consult with a First Nation if it intends to justify the constitutionality of its action.

The Supreme Court in the recent Haida case rejected this argument, affirming that rights do not need to be proven and infringed in order for a duty of consultation to be activated. However, Alberta's Treaty argument has been upheld by Courts in Alberta, and more recently by the Federal Court of Appeal in *Mikisew Cree First Nation v. Canada (Minister of*

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[31] At paras. 48-51: "In any event, Alberta submits that there is no duty to consult in areas that are the subject of Treaty as there is no infringement of a Treaty right...The issue is whether the Treaty as modified by the Natural Resources Transfer Agreement permits hunting on lands not "taken up" or "occupied", and that a taking up or occupying of lands means that there is no infringement of a right and there is no need to justify under the *Sparrow* test which included a consultation component."

Canadian Heritage) (FCA No. 66 [2004]). It is uncertain the effect *Haida* and *Taku* will have on the ruling in *Mikisew* which is currently under appeal. Until the application of these cases in the Treaty 8 context is clarified, when considered with *Halfway River First Nation v. British Columbia (Minister of Forests)* (B.C.J. No. 1880 (B.C.C.A.) [1999]), discussed below, the result is that there is different law with respect to the duty to consult regarding Treaty 8 rights in Alberta and British Columbia.

Other pre-*Haida* cases support Alberta's argument; for example, in *R. v. Cardinal* (A.J. No. 908 [2003]).[32] In *Cardinal*, a Treaty 6 Indian from the Goodfish Lake Band was charged with hunting in a wildlife sanctuary near Nordegg, in contravention of section 40.1 of the *Wildlife Act* (R.S.A. 2000, W-10). Alberta established the wildlife sanctuaries to try to protect elk and other animals from recreational hunters, First Nation hunters and poachers; hence, they were a part of a larger effort aimed at conserving the wildlife resource and maintaining stability in populations (paras. 50-52). The central issue before the Court was whether the game sanctuaries represented a justified infringement of Treaty rights to hunt, and whether adequate consultation had occurred with the affected Bands in the vicinity before the corridors were established. On the question of consultation, Judge Schollie of the Alberta Provincial Court made the following statements (paras. 60-62):

> ...there's no limitation upon the government to take up lands for settlement or other purposes. The duty to consult that has been mentioned in this action over the last few days, the documents inform me that the duty to consult was fulfilled by the treaty itself, and the subsequent survey of reserves, and the fulfillment of the treaty land requirement in the treaty. There's no other requirement to consult in terms of taking up lands for settlement or any other type of purpose.

However, in *R. v. Breaker* (A.J. No. 1317 [2000]), an earlier Alberta Court judgement, a very different conclusion was reached. *Breaker* involved hunting in a road corridor wildlife sanctuary by a Treaty 7 Indian. Cioni J. acquitted the accused members of the Siksika Band and held that the government regulation in the corridor did not apply because of a lack of recognition and reconciliation of the Treaty rights held by the accused. Cioni states (para.507):

> The test here is not solely the merit of a road corridor sanctuary, along Highways 40 and 541, but a full scrutiny of what accommodation has been made for Mr. Breaker's right to hunt for food in the Highwood and WMU 404. I find there to be no such accommodation. The approaches taken do not add up to minimal infringement but, in my view, to maximum control of Native hunting, while leaving a narrow allowance of Native subsistence hunting, without due regard to practicality. As such,

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[32] This approach was also recently adopted by the Federal Court of Canada in the decision of *Treaty Eight First Nations v. Canada (Attorney General)* (F.C.J. No. 1009 [2003]).

> and until there is a scheme of priority and allocation for the First Nations right to hunt for food in the Highwood Valley and WMU 404, the current Regulations can not be upheld against Mr. Breaker.

Hence, the key issue was not whether Alberta had the right to regulate hunting in the corridors for conservation purposes, but that the province failed to adequately reconcile its power with the continuing rights of First Nation groups to hunt in the area.

In the recent decision *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (FCA No. 66 [2004]) a majority of the Federal Court of Appeal agreed with the perspective set out in *Cardinal*. In *Mikisew* the central issue was the decision of the Minister of Canadian Heritage to approve a winter road through a portion of Wood Buffalo National Park used by the Mikisew Cree people for subsistence and cultural purposes. At trial (F.C.J. No. 1877 (F.C.T.D.) [2001]), the Mikisew Cree brought the action claiming that the decision to build the road was made without adequate consultation with the Band or its members. The Minister claimed that any Treaty rights in the Park were extinguished and therefore consultation with the Mikisew people was not necessary. Alternatively, the Minister claimed that any infringement of rights that may have occurred would withstand the scrutiny of the *Sparrow* test (para. 4).

At trial, Hansen J. held that Treaty rights continued to exist in the park as the park did not represent a 'taking up' of lands in a manner incompatible with those rights (para. 73), that those rights were not extinguished through clear and plain legislative intent (para. 83) and that the construction of the road constituted a *prima facie* infringement of these rights (para. 98) which was not justified under *Sparrow* (para.184). On appeal, a majority overturned the decision of the trial judge. Relying heavily on an argument forwarded by the intervener the Attorney General of Alberta (largely abandoned by counsel for the federal Minister) Rothstein J.A. and Sexton J.A. held that the road was a 'taking up' under Treaty 8 which constituted a visible and incompatible use with the subsistence rights held under the Treaty (paras. 8 and 12). Because the Treaty expressly provided that lands would be 'taken up' from time-to-time, there was no infringement of the Treaty rights held pursuant to Treaty 8 and therefore no infringement of s.35 of the *Constitution Act, 1982* (para.21). With respect to when the need for consultation would be required in the circumstances, the Court noted (para. 18):

> ...with the exception of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose expressly or necessarily implied in the treaty itself cannot be an infringement of the treaty right to hunt.

In other words, if there is no infringement then there is no need to meet the test in *Sparrow* and no duty to consult. Although the Court did note that the Minister may have consulted more extensively than she did, ultimately the nature and extent of consultation in the circumstance was within the Minister's discretion (para.24).

4.3 The Nature of Consultation: Challenges with Alberta's Legal Perspective

In *Mikisew* (F.C.C.A) the Court considered consultation as being sourced in a narrow interpretation of the *Sparrow* test.[33] Justification under the test is itself triggered by the *prima facie* infringement of Aboriginal and Treaty rights. Because the taking up of lands is explicitly provided for in the numbered Treaties, in both cases the Courts said the taking of lands does not generally constitute a *prima facie* infringement and therefore justification is not required.[34] It follows that this line of reasoning raises serious challenges to the suggestion that the fiduciary component of the honour of the Crown is activated in a Treaty 8 context where a valid taking up is contemplated.[35] However, there are several problems with the Federal Court of Appeal's analysis in *Mikisew*, as outlined below.

The first problem is that this reasoning ignores the well-established doctrine that consultation is part of a larger justificatory process meant to reconcile and balance rights through negotiation, not litigation. *Mikisew* implies that each activity on the land be considered separately, as a stand alone "taking up" of lands by the Crown. The only time larger effects are to be considered is when "[the Crown] has taken up so much land that no meaningful right to hunt remains" (para. 18). Alberta has 100 million acres of public land

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[33] Hence, a reactive duty is contemplated which is triggered by the infringement of proven rights, as opposed to proactive duty which may be triggered by the potential infringement of proven or potential rights.

[34] It is important to note that this analysis is not entirely accurate. Even if the Crown has rights under Treaty to take up lands, this does not mean that magically there is no longer an on-the-ground impact or infringement of the rights in question. In reality, building a road or running a seismic line may still affect rights: just because a impact is legally 'justified' or anticipated under Treaty does not mean that its effects are erased. Therefore, what is really being advocated is the concept of an alternative justificatory process, one that exists within and because of Treaty. Rights are infringed, but this infringement is justified because of the terms of Treaty, namely the Crown right to 'take up' lands. The process for this alternative framework is not whether there has been adequate consultation, priority, mitigation, etc., but rather whether the 'taking up' is visibly incompatible with the practice of subsistence rights held pursuant to Treaty and whether the taking was a) not done in bad faith or b) does not result in a situation where no meaningful right to hunt remains (eg. *Mikisew*, para. 18).

[35] Above it was forwarded that in a Treaty 8 context, the fiduciary duty may have implications for consultation such as the content of the duty may be expanded and the requirements on the Crown may be more strenuous, perhaps with a greater degree of responsiveness necessary to meet the duty. This would mean that content of the duty may move beyond the minimum of notification and good faith negotiation with the intent of substantially addressing concerns, up the spectrum to a more regular application of accommodation through minimal interference and taking steps to avoid irreparable harm.

and currently there are 176,000 active dispositions in relation to Crown land with 18,000 new dispositions added each year, of which 12,000 are related to oil and gas (Factum of the intervener Attorney General of Alberta, *Haida*, Court File No. 29419 at para. 70). It is very unlikely that First Nations or the Crown would have anticipated that this level of development in the Treaty 8 area at the time of its negotiation. Also, development in Alberta often occurs over a period of time by multiple proponents from a whole host of industries, with the result being that the landscape is threatened with "death by a thousand cuts". If consultation can be averted on a disposition-by-disposition basis, then the overall integrity and sustainability of the landscape is jeopardized. Subsistence Treaty rights are interrelated with and dependent upon ecological sustainability and, under this regime, over time rights would be nullified and a fair balance and reconciliation not achieved. Essentially, the promise of protection and recognition of Aboriginal rights in s.35 (1) of the *Constitution Act, 1982* is made sterile. As a result, the concept of cumulative effects is a serious challenge to the application of the precepts presented by the Federal Court of Appeal in *Mikisew*.

Schneider (2002; 2003 *et. al.*) considered industrial activity in the boreal forest of northern Alberta and characterized the main industries as those related to forest and oil and gas development. To examine the impact of the direct results of these activities, "linear features" were used which describe long narrow openings and localized compact openings surrounding physical units of infrastructure or development. When considered together, these openings and accesses to previously remote areas of the landscape were termed the "industrial footprint". Direct negative effects of linear features have been demonstrated for many species including woodland caribou, fisher and songbirds (St. Clair 2003) and have also contributed to fragmentation of the landscape, increases in illegal and legal hunting and fishing pressure as well as the increased frequency of human-caused fires (Cumming and Cartledge 2004:10). Further, many activities may have lasting effects such as pollution or erosion or the removal of key habitat for animals and fish and the use of ATVs and other all terrain vehicles may run down exposed areas, sometimes even preventing re-growth. Increased noise levels may also drive away game resources and surface pipelines may cut off migration routes or access trails used by boreal forest mammals (Bayne *et. al.*: 2004), and road allowances impose restrictions such as corridors where the discharge of firearms are not allowed.

To emphasize the extent of the industrial activity forecast for this area, it is noteworthy that there is a 700% increase expected in the number of oil and gas wells drilled from the year 2000 to 2030 (Schneider 2003 *et. al*: figure 2). In addition to the overall

increase in the industrial footprint, it is also apparent that the current management practices in the boreal forest are not prepared to adapt to the impacts that climate change may have on the forest ecosystem (Parker *et. al.*: 2000; O'Shaughnessy and Johnston 2002). Arguably, in many areas of Treaty 8 where developments are intensive and Crown lands are under continual development and exploration, the landscape has become so saturated that each additional activity proposed immediately threatens its remaining ability to support subsistence rights. When the cumulative effects and the industrial footprint in northern Alberta are considered together, there may remain "no meaningful right to hunt" and a duty to consult First Nations on future land management and resource development activities should therefore be presumed.

The second problem, which is related to the first, is that the Court in *Mikisew* failed to take into account the special relationship between the Crown and Native peoples. At the trial level, Hansen J. also notes this problem, which I believe is worth repeating here (para. 84-85):

> As an aside, the respondent also advanced the following proposition in these proceedings: the road approval itself amounts to a "taking up" of land by the Crown…The approach of the Crown forwarded here would render the 1982 constitutionalization of the treaty rights meaningless. It is clear that post-1982, the Crown cannot unilaterally defeat treaty rights. This position taken by the Minister cannot be reconciled with the honour and integrity of the Crown as a fiduciary.

The Federal Court of Appeal also failed to properly apply the rules of Treaty interpretation, as sketched out by the Supreme Court (*R. v. Badger* (1 S.C.R. 771 [1996]) at para.41):

> First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians must be narrowly construed. Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown… [citations omitted]

Interestingly, in *Halfway River First Nation v. British Columbia (Ministry of Forests)* (B.C.J. No. 1880 (B.C.C.A.) [1999]) arguments similar to Alberta's had been forwarded and were rejected.

In *Halfway*, descendants of a group of Beaver Indians who were signatory to Treaty 8

in 1900, sought judicial review of a decision by the District Manager of the Ministry of Forests approving a cutting permit for Canfor in an area adjacent to their reserve. The Halfway River.First Nation claimed that they continued to employ the land for a variety of purposes integral to the maintenance of their traditional culture, including hunting, fishing, trapping and gathering plants for medicinal, subsistence and spiritual purposes. Both the Minster and Canfor argued that the right to hunt preserved in Treaty 8 is held subject to two independent rights of the Crown; namely, 1) the power of the government to regulate hunting, trapping an fishing and 2) the power of the government to take up parts of the Treaty lands for purposes of development and settlement (paras. 94-95). Specifically, the appellants argued that the granting of a cutting permit by the B.C. Crown was 'taking up' lands, and therefore was not an infringement of the Treaty rights held by the Halfway First Nation (para. 96).[36]

A majority of the B.C. Court of Appeal agreed to set aside the decision of the district manager. Although the concurring judgements differed on what level of Crown interference constitutes infringement (para 186), they agreed that the allocation of the forest permit constituted a taking up and infringement of the Treaty right to hunt. Because the two concurring judgements characterized the problem differently, only Justice Finch considered the taking up argument. Justice Finch approached the matter by reiterating principles of Treaty interpretation outlined by the Courts and then applying those principles to the *Halfway* circumstances. In *Mikisew* Sharlow J.A. provides the following summary of the principles used by Justice Finch:

1. A treaty should be given a fair, large and liberal construction in favour of the Aboriginal signatories
2. A treaty must be construed not according to the technical meaning of its words, but in the sense that they would naturally be understood by the Aboriginal signatories.
3. As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned.
4. Any ambiguities or doubtful expressions in the wording of a treaty must be resolved in favour of the Aboriginal signatories. Any limitation on the rights of the Aboriginal signatories under a treaty must be narrowly construed.
5. Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content. Courts must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration.

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[36] Note also that 'lumbering' is specifically mentioned under Treaty 8 as an example of taking up. The creation of a road corridor or winter road building is not.

Justice Finch also dismisses the assertion that the *Sparrow* test should not be applied within the Treaty 8 context (para. 127):

> The fact that a treaty underlies the aboriginal right to hunt in this case does not, to my mind, render inapplicable the s.35(1) analysis engaged in by the court in *Sparrow*. Section 35(1) gives constitutional status to both aboriginal and treaty rights. As indicated above, treaties with aboriginal peoples have always engaged the honour and integrity of the Crown. The fiduciary duties of the Crown are, if anything, more obvious where it has reduced its solemn promises to writing.

Justice Finch finds infringement of the Treaty right in the case because he views Treaty as an instrument that acknowledges competing rights (para. 134):

> ...the Indians' right to hunt granted to the signatories of Treaty 8, and the Crown's right to regulate, and to require or take up lands, cannot be given meaning without reference to one another. They are competing, or conflicting rights as has been recently affirmed in *R.v. Sundown*... The Indians' right to hunt is subject to the "geographical limitation", and the Crown's right to take up land cannot be read as absolute or unrestricted, for to do so (as even the Crown concedes) would render the right to hunt meaningless. Such a position cannot be asserted in conformity with the Crown's honour and integrity. So even before the enactment of s.35 in 1982, a balancing of the competing rights of the parties to the Treaty was necessary.

As a result, Justice Finch concludes that infringement in the context of Treaty 8 is obvious, almost a presumption, when Crown powers over lands are exercised (para. 136):

> I am therefore of the view that it is unrealistic to regard the Crown's right to take up land as a separate or independent right, rather than as a limitation or restriction on the Indians' right to hunt. In either case, however, the Crown's right qualifies the Indians' rights and cannot therefore be exercised without affecting those rights.

In *Badger*, the Supreme Court considered the Alberta context and spent considerable effort discussing the extent to which provincial game laws may affect Indian subsistence rights under Treaty. What is interesting about this is that Treaty 8 clearly provides for Crown regulation of Indian subsistence rights for conservation purposes:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty...

In fact, these powers were also expressly entrenched in s.12 of the *NRTA* in 1930:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof...

Like the 'taking up of lands', powers to regulate are anticipated in Treaty 8 and often conflict with Indian Treaty rights. However, in evaluating conservation provisions existing in the regulatory structure under the *Wildlife Act* (S.A. 1984 c. W-9.1), Cory J. held that the conservation component of the licensing provisions under the Act did constitute a *prima facie* infringement (para. 90). In *Badger*, Cory J. states at para. 96:

> In my view justification of provincial regulations enacted pursuant to the *NRTA* should meet the same test for justification of treaty rights that was set out *Sparrow*. The reason for this is obvious. The effect of para. 12 of the *NRTA* is to place the Provincial government in exactly the same position which the Federal Crown formerly occupied. Thus, the Provincial government has the same duty not to infringe unjustifiably the hunting right provided by Treaty No. 8 as modified by the *NRTA*. Paragraph 12 of the *NRTA* provides that the province may make laws for a conservation purpose, subject to the Indian right to hunt and fish for food.

The point is that even though the right of the province to regulate Indian rights to hunt and fish is entrenched in Treaty and the *NRTA*, Cory J. still holds those powers of the Crown accountable to justification in the larger context of balancing and reconciling rights.[37] The *NRTA* passed power as well as duty and those powers need to be balanced and reconciled within the context of maintaining the tenability of Aboriginal culture and way of life. They were not simply free rein to impose the will of the province on Aboriginal people.[38]

However, Cory J. also cautioned against the assumption that all Crown exercise of power through land management or resource development would constitute an infringement of Treaty rights to use lands or resources. Cory J. plainly held that "limitations" on the exercise of Treaty rights are contemplated in the Treaty (para. 37):

> The analysis should proceed through three stages. First, it is necessary to decide what effect, para. 12 of the *NRTA* had upon the rights enunciated in Treaty No. 8.

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[37] In distinguishing the case from the *Simon* case, Cory J. made the following observation (para. 91): "By contrast, in this case, para. 12 of the *NRTA* specifically provides that the provincial government may make regulations for conservation purposes, which affect the Treaty rights to hunt. Accordingly, Provincial regulations pertaining to conservation will be valid so long as they are not clearly unreasonable in their application to aboriginal people." In *Badger* Cory J. used the *Sparrow* test as the template for what is 'clearly unreasonable'. If this template is used with respect to the taking up of lands, then there is no doubt that the a central issue in this evaluation will be the nature, extent and quality of consultation that occurred prior to the taking up of the lands.

[38] Indeed as early as 1932 (only 2 years after the transfer of natural resources to Alberta) McGillivray J.A. recognized in *Rex v. Wesley* (58 C.C.C. [1932]) that s.12 was drafted predominantly to reassure Indians that their rights would be protected from reckless provincial lawmaking (para. 269): "I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but in hunting wild animals for food necessary to his life, the Indian should be placed in a very different position from the white man who generally speaking does not hunt for food and was by the proviso to s. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial."

> After resolving which instrument sets out the right to hunt for food, it is necessary to examine *the limitations which are inherent in that right. It must be remembered that, even by the terms of Treaty No. 8, the Indians' right to hunt for food was circumscribed by both geographical limitations and by specific forms of government regulation.* Second, consideration must be given to the question of whether the existing right to hunt for food can be exercised on privately owned land. Third, it is necessary to determine whether the impugned sections of the provincial *Wildlife Act* come within the specific types of regulation which have, since 1899, limited and defined the scope of the right to hunt for food. *If they do, those sections do not infringe upon an existing treaty right and will be constitutional.* If not, the sections may constitute an infringement of the Treaty rights guaranteed be Treaty No. 8, as modified by the *NRTA*. In that case the impugned provisions should be considered in accordance with the principles set out in *R. v. Sparrow*... [emphasis added]

The key for Cory J. is to balance the rights and interpret those rights with reference to one another (paras. 13-14; emphasis mine):

> ... It is clear, however, that the NRTA does require a balancing of rights. The right of the province to legislate with respect to conservation must be balanced against the right granted to the Indians to hunt for food...Although the *Sparrow* test was developed in the context of s. 35(1), the basic thrust of the test, to protect Aboriginal rights but also to permit governments to legislate for legitimate purposes where the legislation is a justifiable infringement on those protected rights, applies equally well to the regulatory authority granted to the provinces under para.12 of the NRTA as to the federal power to legislate in respect of Indians...In applying them in this context, it is important to bear in mind that what is being justified is the exercise of a power granted to the provinces, which power is made subject to the right to hunt for food.

In this view, the Crown has special powers under Treaty 8, but in the end those powers must be reconciled with duty in such as way as to maintain the honour and integrity of the Crown.[39] The perspective that Crown powers to "take up" somehow trumps First Nation subsistence rights negotiated under Treaty 8 fails to recognize that reconciliation is an ongoing process. Treaty is not the final reconciliation and settlement between the Crown and First Nations. The Supreme Court is clear in *Haida* that reconciliation is an ongoing process, not a legal remedy (para. 32):

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense.

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[39] In *R. v. Breaker* (A.J. No. 1317 [2000] at para.510; emphasis mine) Cioni J. had these comments: "Achieving this balance well represents the honour of the Crown, just as the Governments of Canada and Alberta have settled affairs with Aboriginal First Nations through respect, agreements and peace. There has been no war - there should be no winners or losers. That again, is not the intent of the Treaty or the NRTA."

Reconciliation is a process and Treaty negotiation and implementation is one important step in this process. Reconciliation is about give and take and a fair balancing of interests. It cannot be effective without open communication on both sides in a good faith effort to work together to find solutions which consider the claims, interests and concerns of both sides. Arguably, consultation is the mechanism that allows the continuing process of reconciliation to take place. In this sense, it must remain a regular fixture in the Crown-Native relationship in Canada, regardless of what the express written terms of a Treaty may seem to imply.

A third problem with the reasoning in *Mikisew* is that it does not consider the implicit commitment of the Crown to the cultural sustainability of First Nations, through Treaty 8 and the *Royal Proclamation, 1763*. As outlined above,[40] hunting, trapping, fishing, and gathering are central to the cultural sustainability of many Treaty 8 First Nations, including LRRCN. The symbolic and material values of subsistence harvesting are linked and the forest is the ecosystem that facilitates the performance of these activities. As a result, land management and resource development decisions have the potential to affect the ability of LRRCN culture to perpetuate itself and remain responsive to social, political, economic and environmental changes. The common intention of the parties entering into Treaty 8 was to ensure the way of life of the Indians would continue, and necessarily, that the forest would be managed sustainably to ensure Treaty promises would be kept and the honour of the Crown maintained. Underlying Treaty 8 and *The Royal Proclamation, 1763*, there is a general understanding that development and settlement may come, but there is a concurrent commitment that this development would happen in a sustainable way and with consideration of Indian interests. These documents are a recognition that development would consider and make provision for the rights of Indian peoples who inhabited the lands before non-natives. The *Royal Proclamation, 1763* and Treaty 8 should be understood as a presumption of First Nation rights and as well as a recognition of a way of life—it was a commitment to the cultural sustainability of Indian Nations. An unqualified Crown right to take up lands in the Treaty area without consideration of subsistence rights, through consultation, seriously jeopardizes the solemn promise that the way of life of the First Nations would continue.

Finally, even if one were to assume that there was no infringement of a cognizable Aboriginal or Treaty right because these rights are limited in geographical scope by the Treaty right of the Crown to take up lands, it remains that there would still be a Crown duty

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[40] Section 2.5

to consult.[41] In the recent Supreme Court decision in *Haida* it is made clear that the duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (para. 35), in essence the knowledge of a "credible, but unproven claim" (para. 37). Even a dubious or peripheral claim may attract a mere duty of notice. The key is that the content of the duty varies with the circumstances (para. 37). So, if it were true that the "taking up" provision in Treaty 8 created a situation where there may be no cognizable right, the result would be that First Nations in Treaty 8 would essentially be in a situation where there would be little or no proof that rights exist in areas where lands are to be taken up. The Supreme Court is clear in *Haida* that "the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty" (para. 37). A virtually unqualified Crown duty to take up lands denies the existence of a credible claim rather than "assigning appropriate content to the duty", given the nature of the circumstances. Arguably, the simple fact that the Supreme Court is willing to hear the appeal in *Mikisew* implies that the claim of the right is credible. Therefore the question in *Mikisew* should not have been whether a duty to consult exists but whether the duty was met given the nature of the consultation that occurred.

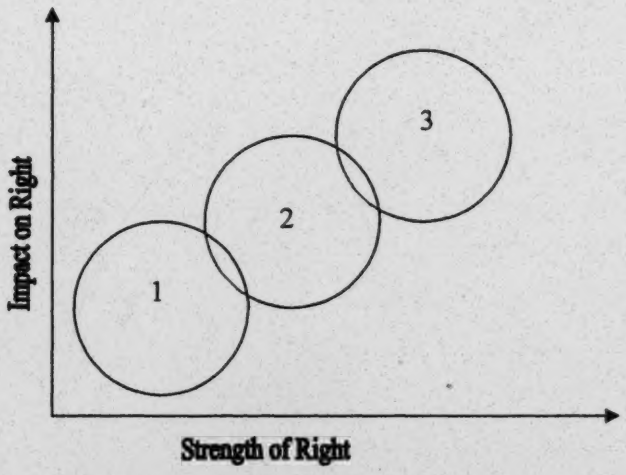
This is compatible with the precepts outlined above. The Crown and Aboriginal people have a special relationship in that the honour of the Crown is engaged in an ongoing process of reconciliation. Treaty 8 is an instrument that may be used to effect a meaningful reconciliation and maintain the honour of the Crown in the process. It is a way of both recognizing and balancing interests, and the honour of the Crown would dictate that Treaty 8 should not be interpreted in such a way as to award one party powers to the detriment or exclusion of the other party. This would defeat the purpose of Treaty. Rather, Treaty should be interpreted in such as way as to effect a meaningful reconciliation. In the case of the Treaty 8 taking up clause, this would mean that signatory First Nations had their way of life recognised and entrenched in the Treaty while simultaneously allowing for Crown sovereignty over lands and resources to be performed. A detailed procedural process may not be outlined in the Treaty on how to resolve conflict between the Treaty rights of the Crown

[41] Indeed, the Crown might also argue that even if the taking up provision in Treaty 8 is not sufficient to make right incognizable, the fact that the performance of the right is continued on a wide area after taking up, the right is equally difficult to define for the purposes of consultation. However, I would suggest an alternate view; namely that specificity is enhanced through limitation. Sustenance rights are limited: 1) for food purposes 2) by justified regulation 3) federal expropriation (before 1982) 4) to regions (at least under Treaty, prior to *NRTA* modification 5) to areas unoccupied by the Crown. Arguably, these limitations have the effect of enhancing the specificity of the rights, thus making them cognizable interests for the purposes of activating the fiduciary obligations of the Crown.

and those of First Nation signatories, but that process is implied and should be interpreted on a case-by-case basis according to what the honour of the Crown would necessitate.[42]

4.4 Towards Meaningful Consultation

I suggest that there are three distinct stages of consultation. The first stage applies to those cases where there are potential rights that have minimal evidence supporting them. The second stage applies to those claims where a strong *prima facie* case exists, and there is a "credible, but unproven claim" (*Haida*, para. 37). The third stage applies to those cases where there are established rights or title of First Nations, such as claims which have been recognized by a Court or negotiated directly with the Crown through Treaty or agreement. The following diagram of this spectrum may help visualize these stages as they apply in different contexts:



[42] What 'the honour of the Crown necessitates' in the process of consultation is in turn determined with reference to the key principles of Treaty interpretation, including "...the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration". So, it may be that given the nature of the facts in *Mikisew* that the Supreme Court could determine that the consultation that occurred in that case suffices to meet the requirement of the honour of the Crown and effect adequate reconciliation in those circumstances. The remote location of the area, the minimal impacts of the road and the vast amount of available Crown lands surrounding the development differentiate the case from many other areas of Treaty 8 where development is intense and effects are cumulative. The fact that the plans were changed to realign the road in an attempt to accommodate the early concerns of Mikisew (*Mikisew* (F.C.C.A), para. 56-57) also may go far to meet the requirements of the duty in those specific circumstances. However, regardless of whether the duty was met in that specific case, the key is that some measure of meaningful consultation would be required in order to reconcile the interests of the Crown and Mikisew. Imposing an inflexible and narrow interpretation of Treaty 8 in the context of taking up should be abandoned in favour of determining what would effect meaningful consultation in each circumstance.

For the purposes of discussion, I assume that impact roughly correlates with the strength of the claimed right, thus creating a diagram that flows neatly from bottom left to top right. This is convenient for the purposes of theory, although it is of course likely that in practice even a loosely defined right could potentially be seriously impacted by a proposed activity. Likewise, it is plausible that a even a strong *prima facie* or established right may encounter a potential impact that is so minor that minimal duties are required to meet the duty to consult (*Haida* (S.C.C), para. 43). Rather than extrapolate every conceivable circumstance that could flow from the diagram, I create overlap between each stage in order accommodate anomalies.

As we move up the spectrum, the consultative requirements of each stage will vary with respect to the level of impact contemplated by the Crown and the strength of the claim (*Haida,* paras. 39; *Taku*, paras. 29-32). In *Taku* (paras. 25,32) the Supreme Court refers to this measured approach as "responsiveness" which is a sliding scale of Crown duty dependent upon the nature of the circumstance. When considered as a whole, the principles that may inform the various stages of consultation have been outlined by the Courts over time, and can be roughly described as follows:

1. The Crown and First Nations must consult in good faith (*Delgamuukw v. B.C.*, 3 S.C.R. 1010 [1997]); *Nunavik Inuit v. Canada (Minister of Canadian Heritage),* 4 C.N.L.R. 68 [1998]; *Mikisew Cree First Nations v. Canada (Minister of Canadian Heritage),* F.C.J. No. 1877 [2001]; *Haida Nation v. British Columbia (Minister of Forests),* SCJ No. 70 [2004]).

2. The procedural safeguards of natural justice will apply to consultation (*Haida Nation v. British Columbia (Minister of Forests),* SCJ No. 70 [2004]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, SCJ No. 69 [2004]).

3. The 'quality' of consultation is generally more important that the 'quantity' of consultation and in most instances consultation will amount to more than mere notification (*Halfway River First Nation v. British Columbia (Ministry of Forests)*, 4 C.N.L.R. 45 (B.C.S.C.) [1997]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2 C.N.L.R. 312 [2002]; *Cheslatta Carrier First Nation v. British Columbia,* No. 539 (B.C.C.A.) [2000]).

4. The Crown must fully inform itself of the possible effects of its proposed actions and this should include input from First Nations (*R. v. Jack,* 131 D.L.R. (4th) 165 [1995]).

5. Input from First Nations must be received with the intentions of substantially addressing concerns and a willingness to make changes based on information shared by First Nations. (*Delgamuukw v. B.C.*, 3 S.C.R. 1010 [1997]; *Halfway River First Nation v. British Columbia (Minister of Forests),* B.C.J. No. 1880 (B.C.C.A.) [1999]; *Nunavik Inuit v. Canada (Minister of Canadian Heritage),* 4 C.N.L.R. 68 [1998];

Haida Nation v. British Columbia (Minister of Forests), SCJ No. 70 [2004]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, SCJ No. 69 [2004]).

6. Consultation does not equate to consent for First Nations, except in certain circumstances such as when the very existence of the rights might be jeopardized by proposed actions and the Crown is not generally under a duty to reach agreement (*R. v. Sampson*, 131 D.L.R. (4th) 192 [1995]; *Delgamuukw v. B.C.*, 3 S.C.R. 1010 [1997]; *Haida Nation v. British Columbia (Minister of Forests)*, SCJ No. 70 [2004]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, SCJ No. 69 [2004]).

7. Adequate time to meaningfully consult First Nations must be allotted and rigid regulatory or legislative timelines may not excuse the Crown from this requirement (*R. v. Noel*, 4 C.N.L.R. 78, N.W.T. Terr. Ct. [1995]).

8. First Nations cannot frustrate the consultation process, and must express their concerns and interests once they have had enough time to review information (*Halfway River First Nation v. British Columbia (Minister of Forests)*, B.C.J. No. 1880 (B.C.C.A.) [1999]; *Kelly Lake Cree Nation v. Canada (Minister of Energy and Mines*, B.C.J. No. 2471 [1999]; *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68).

9. First Nations may be entitled to a separate consultation process than that of the public or other stakeholders (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, F.C.J. No. 1877 (F.C.T.D.) [2001]; *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 4 C.N.L.R. 45 (B.C.S.C.) [1997]).

10. The Crown must provide full information to a First Nation whose rights may be potentially infringed by Crown actions, and this information may need to be more detailed than standard information provided to other stakeholders (*R. v. Jack*, 131 D.L.R. (4th) 165 [1995]; *R. v. Sampson*, 131 D.L.R. (4th) 192 [1995]; *Halfway River First Nation v. British Columbia (Minister of Forests)*, B.C.J. No.1880 (B.C.C.A.) [1999]; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, F.C.J. No. 1877 (F.C.T.D.) [2001]).

11. The Crown is ultimately responsible for initiating the consultative process (*R. v. Sampson*, 131 D.L.R. (4th) 192 [1995]).

Of course, as noted above, not all principles will apply in each stage on the spectrum. The requirements of each stage are unique and are also determined on a case-by-case basis (Isaac and Knox 2003:para. 47; Fisher 2002:3; Garton 1999: 4-5; *Delgamuukw v. B.C.*, 3 S.C.R. 1010 [1997] at para.168).

In *Haida*, the Supreme Court sources both consultation and accommodation in the honour of the Crown (para. 16), which is activated because of the assertion of Crown sovereignty (para. 59). However, the Court also clearly specifies that accommodation is not a regular step in consultation, but is a requirement which may be appropriate in select

circumstances (para. 47). The two are linked given their common source in the reconciliation of rights, and the fact that "good faith consultation may be to reveal a duty to accommodate" (para. 47). As with consultation, the requirements of meaningful accommodation are very dependent upon the nature of the circumstances at hand. For example, in *R. v. Sparrow* (1 S.C.R. 1075 [1990]) the Supreme Court determined that granting priority to Aboriginal fishing rights for food and ceremonial purposes over competing interests would be an appropriate accommodation. However, in the commercial fishing rights context considered in *R. v. Gladstone* (2 S.C.R. 723 [1996]), the Supreme Court noted that it would be inappropriate to apply this type of priority to a commercial context. Accommodation could be achieved if the government allocated the resource in a manner respectful to priority (para. 62).

It would appear that accommodation is fundamentally different than "substantially addressing concerns and a willingness to make changes based on information" (number 5, above) because where substantially addressing concerns in consultation incorporates changes based on information, accommodation does so based on rights and interests themselves. For example, in the case of the right to fish for food in Alberta, substantially addressing concerns and making changes based on First Nation information may require that fishing regulations be altered to allow for an extra two weeks of fish spawning, thus facilitating the continued enjoyment of the right to fish for food but also the interests of conservation and other stakeholders. Accommodation in this same circumstance (when merited) may see the lake itself closed to all fishing except Aboriginal subsistence fishing, or perhaps a reduction of fishing licenses on the lake to reduce fishing pressure from other stakeholders.[43] Given the nature of accommodation, it would appear that in most cases accommodation would only be activated in stages two and three on the consultation spectrum, where there was either a strong *prima facie* case or a proven right.

The precepts that apply the duty of accommodation have been roughly outlined by the Courts over time, and may be described as follows:

1. Accommodation is activated when the consultation process suggests amendment of Crown policy (*Haida Nation v. British Columbia (Minister of Forests)*, SCJ No. 70 [2004]).

2. Accommodation requirements are informed by good faith consultation (R. v. Sparrow, 1 S.C.R. 1075 [1990]; *Haida Nation v. British Columbia (Minister of Forests)*, B.C.J. No. 1882 (B.C.C.A.) [2002]; *Eastmain Band v. Robinson*, 99 D.L.R.

[43] Of course, the decision to close the lake or change allocation is itself likely partly based on information shared through consultation with First Nations, which explains the relationship between accommodation and consultation in this circumstance.

(4th) 16 [1992]; *R. v. Nikal*, 1 S.C.R. 1013 [1996]; *R. v. Marshall*, 177 D.L.R. (4th) 513 [1999]).

3. Accommodation may require taking steps to avoid irreparable harm, minimizing effects, or considering the priority of Aboriginal rights in management and allocation decisions (*R. v. Gladstone*, 2 S.C.R. 723 [1996]; *R. v. Sparrow*, 1 S.C.R. 1075 [1990]; *Haida Nation v. British Columbia (Minister of Forests)*, SCJ No. 70 [2004]).

4. Accommodation does not necessitate agreement, although in rare cases of established rights it may require consent (*Haida Nation v. British Columbia (Minister of Forests)*, SCJ No. 70 [2004]; *Delgamuukw v. British Columbia*, 1 C.N.L.R. 14 (S.C.C.) [1998]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, SCJ No. 69 [2004]).

5. The Crown bears the burden of proving that its occupancy of lands cannot be accommodated with competing and conflicting Aboriginal rights (*R. v. Cote*, 3 S.C.R. 139 [1996]; *Haida Nation v. British Columbia (Minister of Forests)*, SCJ No. 70 [2004]).

Consultation and accommodation should not be conducted with the expectation or presumption that an activity is approved pending dialogue with First Nations. Sometimes it may become clear that a meaningful reconciliation that satisfies the honour of the Crown cannot be achieved and a project should not move forward. For example, in *Saanichton Marina Ltd. v. Claxton* (3 C.N.L.R. 46 [1989]), the British Columbia Court of Appeal upheld a permanent injunction against the creation of a breakwater and marina in Saanichton Bay. The Tsawout Band brought the action on the grounds that any construction in the Bay would infringe their Treaty right to fish. The Saanich had consented to the surrender under the Treaty term that "we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly". Justice Hinkson, speaking for a unanimous court, ruled that the unqualified right of the Saanich to fish was not merely a public right held in common with everyone else. The construction of the marina would derogate from the right to carry on their fishery as formerly and, although this right did not amount to ownership of the seabed underlying the Bay, it was sufficient to protect the Treaty right. Just because a marina would be a useful asset to the greater public, the public interest was not sufficient to justify jeopardizing the way of life of the Saanich.[44] With the precepts of the duties of consultation

[44] Likewise, in *Halfway River v. British Columbia (Ministry of Forests)* (4 C.N.L.R. 45 [1997]) the Halfway River First Nation claimed that they continued to employ land adjacent to their reserve for a variety of purposes integral to the maintenance of their traditional culture, including hunting, fishing, trapping and gathering plants for medicinal, subsistence and spiritual purposes. Speaking for the majority, Justice Dorgan of the British Columbia Supreme Court held that the decision to harvest timber would constitute a *prima facie* infringement of those rights. The Court held that the Ministry failed to justify the infringement by

and accommodation outlined, it is now necessary to consider how these principles generally interact with the prospective spectrum of consultation and its individual stages.

Stage 1 of the spectrum applies to those cases where there is a claimed right, but minimal evidence exists to support its immediate recognition. As noted above, "even a dubious or peripheral claim may attract a mere duty of notice, and the key is that the content of the duty varies with the circumstances" (*Haida* (S.C.C.), para. 37). As noted in *Haida* (para. 25):

> The potential rights embedded in these claims are protected by s.35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

The excerpt is clear that in the first stage, the Crown is bound to consider claims made by First Nations where "the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and considers conduct that might affect it" (*Haida*, para. 35). However, this implies that a First Nation is under a corresponding duty to undertake efforts to document, share and make known the nature of the rights, interests or title claimed. In the recent case *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)* (2005 ABCA 68) the Court of Appeal of Alberta relayed the practical problems of enforcing a duty of consultation where claims are asserted but undefined (para. 14-19):

> ...the Board still needed some facts to go on. It is not compelled by this legislation to order intervention and a hearing whenever anyone anywhere in Alberta merely asserts a possible aboriginal or treaty right. Some degree of location or connection between the work proposed and the right asserted is reasonable...Despite many opportunities, the First Nation gave the Board very little factual detail or precise information. On appeal it now asserts that the key question was adverse effect on traplines; but that is only one matter of a number vaguely asserted in the letters...The First Nation must know, or be able easily to learn, where its members hunt and trap. None of that hard information was provided to the Board. Instead the solicitors gave vague and adroitly-worded assertions of rights, some of which encompassed all land in Alberta, or in any event, all Crown land in Alberta...The First Nation also contended before us it had no duty to tell the Board specifics, and that the Board should have frozen all development while deciding the question. We cannot agree, and have seen no authority, constitutional or otherwise, requiring such a logical impasse.

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consulting with the Halfway River First Nation with regards to the decision, even though they were bound to do so under the *Sparrow* test and under the special Crown/Aboriginal fiduciary relationship. As a result, the application for review was granted and the decision of the District Manager was quashed.

Hence, First Nations may be required to provide some measure of evidence to support their claims in order that consultation may remain practical—every First Nation in Alberta could not claim all of Alberta with equal force.[45] Consultation is proportionate to the strength of the claim and some measure of effort must be expended to support those claims that are made. In the above example, the claims made probably could have been supported with information gathered through oral testimony or perhaps mapping through a Traditional Use Study. The First Nations' duty in the consultative process is to allow themselves to be consulted, make efforts to build their consultation capacity at the community level, identify the key representatives with whom consultation should take place, provide meaningful input into management plans, and to share their perspective on the nature and scope their rights with the Crown.

There is a delicate balance in this first stage, and the Crown's honour necessitates that it make good faith efforts to understand the claim, and to avoid exploiting the situation to its advantage (*Haida*, para. 27)

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution…To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

This quote is in direct reference to a non-Treaty area; however the parallels are clear. Exploitation of a situation where a First Nation has limited ability to consult or to define its claims will be frowned upon. There remain options based in good faith and honour which may help the Crown. For example, Crown could offset the cost of gathering traditional use data information in order that claims may be legitimized and consultation can be gauged more appropriately. The Crown could also provide funding to First Nations to support the development of their capacity to consult with respect to resource management decisions.

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[45] Similarly, in the recent British Columbia Supreme Court decision in *Husby Forest Products Ltd. v. British Columbia (Minister of Forests)* (B.C.J. No. 185 [2004]) the Court also took issue with the effort made by the Haida to describe the nature of the rights claimed (para.115): "The Haida did not, in their limited and vague responses to the District Manager's constitutionally mandated consultation initiative, respond adequately. It is the responsibility of the Haida, not that of the District Manager, to delineate clearly the aboriginal right they assert would be infringed. As discussed above, the delineation of the right must be context-specific and must set out the traditions and practices relied on to establish the right…"

These are practical and reasonable efforts which would go a long way to maintain the honour of the Crown in all stages, especially where claims are less clear. [46]

Given the above discussion, it is clear that the Supreme Court is not prepared to ignore the pending claims of Aboriginal people while those claims are being pursued. Aboriginal groups across Canada may continue to rely upon the fundamental promise outlined in s.35 (1) of the *Constitution Act, 1982* to sustain their claims until they are resolved and clarified. While the Court is setting a fairly low bar in terms of what is required to activate the duty of consultation, it is also clear that there is also reduced expectation regarding the requirements to meet the stage one duty. Considering the principles of consultation and accommodation outlined above, I suggest that in most situations stage one on the spectrum would require the following principles to be performed in order to maintain the honour of the Crown and to effect reconciliation:

1. The Crown and First Nations must consult in good faith
2. The procedural safeguards of natural justice will apply to consultation
3. The 'quality' of consultation is generally more important that the 'quantity' of consultation and in most instances consultation will amount to more than mere notification
5. Input from First Nations must be received with the intentions of substantially addressing concerns and a willingness to make changes based on information shared by First Nations
6. Consultation does not equate to consent for First Nations, except in certain circumstances such as when the very existence of the rights might be jeopardized by proposed actions and the Crown is not generally under a duty to reach agreement
7. Adequate time to meaningfully consult First Nations must be allotted and rigid regulatory or legislative timelines may not excuse the Crown from this requirement
8. First Nations cannot frustrate the consultation process, and must express their concerns and interests once they have had enough time to review information
11. The Crown is ultimately responsible for initiating the consultative process

The precepts that would not apply to stage one (in most cases), are those that require special information, a separate process from other stakeholders and the requirement that the Crown inform itself of all possible effects of its proposed actions. It is clear in *Taku* (S.C.C.) that a separate process and information was not required in that case despite the fact that there was

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[46] For example, in *Semiahmoo Indian Band v. Canada* (1 C.N.L.R. 250 [1998]) the Court suggested that the Crown may need to enable First Nations to make good decisions. In other words, in certain situations the Crown may need to provide financial or other support to increase the capacity of First Nations to consult in a meaningful way. It has also been argued that it is ultimately up to First Nations people to develop their own capacity to be consulted (Isaac and Knox 2003:para. 49; *Halfway River First Nation v. British Columbia (Ministry of Forests)* (4 C.N.L.R. 45 (B.C.S.C.) [1997] at paras. 146-147). Without agreeing to capacity funding as being a pillar of good consultation, the Crown may be able to accommodate concerns by developing policy guidelines which outline criteria for funding First Nations consultation in certain situations.

a strong *prima facie* case and in fact the provisions for public consultation under the *Environmental Assessment Act* (R.S.B.C. 1996, c.119) satisfied the honour of the Crown. It is very unlikely that a separate process could be expected for weaker potential rights. The principle requiring the Crown to inform itself of all possible effects is also unlikely to apply here, given that weaker potential rights would be unknown to the Crown and, even were they known, the expectation that the Crown be able to appropriately gauge the impacts on these rights is unrealistic.

Adequate time (number seven) and Crown initiation of the process (number eleven) would not apply until additional information is supplied by a First Nation. Regulatory and legislative timelines are already established in consideration of principles of fairness and reasonableness—given the weakness of the potential rights in stage one, the Courts would likely not expect major projects of heightened importance to the public interest to be stalled by a vague assertion of rights.[47] Similarly, the requirement that the Crown initiate consultation with respect to claims that it may not even be aware of is unreasonable; therefore, this principle should apply only in circumstances where the Crown has been notified of the potential claims. Lastly, it is important to note that none of the precepts of accommodation routinely apply to stage one, given that accommodation has typically been viewed by the Courts as a duty associated with the higher levels of the spectrum where rights are more clear.

Stage two contemplates cases where there is a strong *prima facie* claim by a First Nation that may be potentially impacted by proposed Crown action. Given the huge variability in these kinds of claims, stage two is quite broad in scope and is highly dependent upon the level of impact of the proposed Crown action. In most cases stage two will require a much higher level of responsiveness than stage one, and will include accommodation. However, stage two does not necessarily include all the principles on consultation outlined above. In *Taku* (para. 44), although the Supreme Court recognized a proposed access road to a mine had serious potential impacts to the First Nation, the Court held that a separate process consultation with unique information was not required to discharge the duty of the Crown to consult and accommodate, and that provisions to consult with the First Nation within the *Environmental Assessment Act* were sufficient to meet the duty in that case. This does not preclude the requirement of all principles. In *Taku* the access road for a mine only occupied a small portion of the territory over which the First Nation had a *prima facie* claim to title. One

[47] However, if a First Nation was able to make the case in the earlier stages of project development that the potential rights at stake could be clarified with additional time for consultation, the good faith and honour of the Crown may require that the provision for extra time be provided.

could imagine a case where there was a similar claim but higher potential for impact, perhaps in a case where hydroelectric development or oil sands mining had the potential to seriously impact a claim. Serious detrimental impacts in those circumstances would likely push the case further up the spectrum into the overlap between stages two and three, perhaps triggering the requirement for a separate process. Likewise, a very minimal impact to a strong *prima facie* claim could push the case down the spectrum into the overlap between stages one and two, perhaps releasing the Crown from the principles of informing itself of effects or being flexible in its legislative timelines. Despite these variances, in most cases following principles would apply to stages two:

1. The Crown and First Nations must consult in good faith
2. The procedural safeguards of natural justice will apply to consultation
3. The 'quality' of consultation is generally more important that the 'quantity' of consultation and in most instances consultation will amount to more than mere notification
4. The Crown must fully inform itself of the possible effects of its proposed actions and this should include input from First Nations
5. Input from First Nations must be received with the intentions of substantially addressing concerns and a willingness to make changes based on information shared by First Nations
6. Consultation does not equate to consent for First Nations, except in certain circumstances such as when the very existence of the rights might be jeopardized by proposed actions and the Crown is not generally under a duty to reach agreement
7. Adequate time to meaningfully consult First Nations must be allotted and rigid regulatory or legislative timelines may not excuse the Crown from this requirement
8. First Nations cannot frustrate the consultation process, and must express their concerns and interests once they have had enough time to review information
11. The Crown is ultimately responsible for initiating the consultative process

As noted above, the Supreme Court clearly contemplated the application of the duty of accommodation in both *Haida* and *Taku*, which were both cases involving strong *prima facie* claims. For that reason these precepts are listed separately. This means the following precepts may also apply in stage two on the spectrum:

1. Accommodation is activated when the consultation process suggests amendment of Crown policy
2. Accommodation requirements are informed by good faith consultation
3. Accommodation may require taking steps to avoid irreparable harm, minimizing effects, or considering the priority of Aboriginal rights in management and allocation decisions
4. Accommodation does not necessitate agreement, although in rare cases of established rights it may require consent
5. The Crown bears the burden of proving that its occupancy of lands cannot be accommodated with competing and conflicting Aboriginal rights

Again, given the immense variety of claims that could fall within stage two, the duty to accommodate may not be a default requirement of stage two.

In *Haida* and *Taku* the Supreme Court was confronted with very strong claims for Aboriginal title, which is a bundle of rights encompassing within its definition both proprietary interest to land and resources as well as decision making powers regarding how they should be utilized.[48] Aboriginal title is also a well-defined, well-understood and well-established doctrine in Canadian law. Given that any change to the landscape could seriously affect a title claim, it is no wonder that the Court contemplated the application of the duty of accommodation in those circumstances. The nature of Aboriginal title and its sensitivity to any impact on the land may have had the effect of pushing those cases further up the spectrum into the area of overlap between stage three and stage two. Similarly, in *R. v. Gladstone* (2 S.C.R. 723 [1996]) and *R. v. Sparrow* (1 S.C.R. 1075 [1990]) the Court considered accommodation of fishing rights, a cognizable aspect of Aboriginal culture and well recognized as very susceptible to the impacts of fishery management and allocation. In the context of strong *prima facie* claims that are less understood in practice or with respect to the impacts that Crown action may have upon them, it is unclear if the precepts of accommodation will automatically apply.

The third stage applies to those cases where there are established rights or title of First Nations, such as claims that have been recognized by a Court or negotiated directly with the Crown through Treaty or agreement. In stage three, all the principles and precepts of consultation and accommodation usually apply. This is most obvious in the case of Treaty rights as these rights are the result of solemn, mutually negotiated and agreed upon settlements between the Crown and Aboriginal people. Treaties are negotiated with the Crown for the express purpose of solidifying, clarifying and delineating rather vague Aboriginal rights, doubly protecting those rights by entrenching them in Treaties. Indeed, as Rotman (1997:161) notes, Aboriginal and Treaty rights were given explicit and individual mention in s.35 of the *Constitution Act, 1982* which would again suggest that the drafters of the constitution realised the important differences in these rights. Further, as the Supreme Court in *Haida* notes (para. 19-20):

> The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing"...Treaties serve to

[48] In *Delgamuukw v. B.C.* (3 S.C.R. 1010 [1997]) at pp.1083, C.J.C. Lamer defines Aboriginal title as "the right to exclusive use and occupation of land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures."

> reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "it is always assumed that the Crown intends to fulfill its promises". This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. [references omitted]

Even where there are implied limitations to Treaty rights, those limitations may not excuse the Crown from dealing honourably with First Nations in the continuing process of reconciliation, implemented through the mechanisms of consultation and accommodation. Treaty is a one step in the process of reconciliation, and not the last one.

Also shown above, in a Treaty context negotiated rights and privileges may be sufficiently specific enough to activate the fiduciary component of the honour of the Crown. With Treaty 8 this may be especially true, considering the clear promises of the Crown that the way of life of signatory First Nations would remain unchanged after Treaty, and given the clear manifestation of the rights to hunt, fish and trap within the Treaty. Arguably, if the fiduciary duty is engaged in consultation in a Treaty 8 context, this would likely have the effect of pushing a case further up the spectrum, with the accommodation of rights through priority, avoiding irreparable harm and actively minimizing effects being almost a presumption rather than a consideration in many circumstances. Also, in some cases where the impacts of Crown action seriously jeopardize the rights at stake through a large scale development (i.e. oil sands development) or through cumulative effects, the fiduciary duty may require the Crown to seek the consent of a First Nation before conducting the activity. Treaty 8 meant to provide reconciliation by protecting a way of life and ensuring that First Nations could continue to subsist through the vocations of hunting, trapping and fishing. Because Crown action further disturbs those solemn promises, compensation for impacts or perhaps meaningful involvement in the benefits of development of lands and resources may be required as part of the accommodation required to meet the duty of the Crown in a Treaty 8 context.[49] Finally, because Treaty 8 covers a region of northern Alberta which is slated for ongoing, intensive development and settlement by the Crown over time, it may be that the fiduciary component of the Crown will require a greater involvement of First Nations in the long term, strategic management and planning of the region.

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[49] In *Delgamuukw* Lamer C.J. also notes that, at least in an Aboriginal title context, accommodation may entail that the government accommodate the meaningful participation of Aboriginal people in resource development (para. 167).

With regards the fiduciary component of the honour of the Crown one thing is clear—it does not equate to a fiduciary duty in the ordinary sense. Rather, like many aspects of the Crown-Native relationship in Canada, this duty is *sui generis* in both theory and practice. As a result, to fully understand how the fiduciary relationship may apply to the provincial Crown and what the consequences of that duty may mean in the context of resource development and consultation in the Treaty 8 area of northern Alberta, I will now examine the facets of "traditional" or "general" fiduciary law, followed by an analysis of how the fiduciary relationship has been applied to the Crown in Canada and finally how it may apply to provincial Crowns.

5. General Fiduciary Law

5.1 Finding a Fiduciary Relationship

The origin of fiduciary law in the English courts of equity had a modest beginning with a fairly narrow field of application, meant to act as a safety net that would span the gaps between other areas of law. It allowed the law to be adaptive to irregular circumstances, responsive to situations or relationships where adequate justice would not otherwise be served. However, since its 1726 debut in the landmark case of *Keech v. Sandford* (Sel.Cas.Ch. 61; 25 E.R. 223), where Lord Chancellor King declared that the defendant had to hold a renewed lease as a constructive trust for the infant beneficiary, the gaps between other areas of law have grown and many relationships have tumbled from the pillars of contract and negligence to be saved by the net of fiduciary law.[50]

Weinrib (1975:4) suggests that two elements form the core of the fiduciary concept and serve to define its parameters: the fiduciary must have scope for the exercise of discretion and that discretion must be capable of affecting the legal position of the principal. When a situation arises where one party's legal interests are dependent on, or may be affected substantially by the discretionary power of another party, all the necessary ingredients are present for the creation of a fiduciary relationship. Indeed, as Weinrib (1975:4) states, "the fiduciary obligation is the law's blunt tool for the control of this discretion". Shepherd (1981:96) suggests "A fiduciary relationship exists whenever any person acquires a power of any type on condition that he also receive with it a duty to utilize that power in the best interests of another, and the recipient of that power uses that power." Rotman (1996:178-179) refines this basic approach and suggests four basic elements in his analysis of the early case law:

1. One or more persons (X) possess the ability to affect – positively or negatively – the interests of one or more others (Y).
2. Y's interests within the confines of the particular relationship may only be served – directly or indirectly – through the actions of X.
3. X has an obligation to act in Y's best interests.
4. Y relies upon the honesty, and fidelity of X towards Y's best interests as a result of the relationship.

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[50] Professor McCamus (1997:131) suggests that in many situations fiduciary remedies have been inappropriately applied, without due regard for the consequences of recognizing new relationships, simply for the sake of accommodating changing social and economic conditions. Even so, because the categories of fiduciary relationships remain open, fiduciary remedies will undoubtedly continue to be awarded in new, often curious circumstances in order that the law remains responsive to a changing social, economic and legal environment.

Looked upon more broadly, Rotman argues fiduciary law is primarily a "public policy tool designed to regulate important social and economic relationships" (Rotman 2004:228). Its protection "safeguards necessary interactions that result in one party becoming vulnerable to the actions of another in situations where the latter possesses power over the former's interests" (Rotman 2004:228). However, as elaborated below, pre-existing vulnerability or vulnerability in the sense of being completely dependent upon another is not required.

Examples of categories of relationships which have given rise to relationships which have been recognized as fiduciary are principal and agent, solicitor and client, executor or administrator and beneficiary, director or officer and the corporation, partners, doctor and patient and parent and child, to name but a few (DeMott 1988:908). However, just as a relationship that does not fit nicely into an established category does not preclude that relationship from being recognised as fiduciary in nature, so too being part of a category does not guarantee a place under the fiduciary umbrella.[51] In this sense, it may be more accurate to speak of relationships as having a fiduciary component to them than to speak of fiduciary relationships as such (Shepherd 1981:4-8). Even the intention of the parties—often of central importance in characterizing relationships under other types of law—can be irrelevant in a judicial determination of whether or not a particular relationship is fiduciary in nature. In fact, a fiduciary relationship may be found to exist where neither party intended to create such a relationship, as long the arrangement formed by the parties meets the necessary criteria (Frankel 1983:821). A Court may also impose a fiduciary relationship arising from the conduct of parties for the purposes of achieving an equitable solution to a problem.[52]

Fiduciary obligations arise within the context of particular relationships. When fiduciary law is in issue the role of the Court is to analyse the characteristics of the relationship, determine whether the relationship is fiduciary in nature and, if it is, to apply fiduciary doctrine and determine whether there has been a breach. If there has, then the Court

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[51] Also, it is important to note that "not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty" (*Lac Minerals Ltd. v. International Corona Resources Ltd.* 2 S.C.R. 574 [1989]). This is a key principle of fiduciary law and will be referred to later in reference to recent developments in the interpretation of the federal Crown-Native fiduciary relationship in Canada.

[52] A classic example is *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.* (Ch. 105 [1981]). Here the plaintiff bank accidentally deposited $2 million dollars U.S. into the account of the defendant. Before the plaintiff could recover the money, the defendant became insolvent and in order to recover the sum *in rem* the Court found that the defendant was in breach of fiduciary obligation by not returning the money. This gave the Court access under equity to impose a constructive trust and allowed the plaintiff to remove the money from the estate of the bankrupt defendant. Thus, a fictitious fiduciary relationship was created in order to gain access to the equitable remedies normally reserved for breach of fiduciary duty. Similarly, as Rotman (2004: note 100 at 239) notes, in the case of *M(K) v. M(H)* (96 D.L.R. (4th) 289 (S.C.C.) [1992] at para 73) LaForest J. expressly stated "fiduciary obligations are imposed in some situations even the absence of any unilateral undertaking by the fiduciary".

will apply the appropriate remedy. Due to the adaptive and flexible nature of fiduciary law it is apparent that any attempt to isolate a specific formula or list of attributes that can be used to identify fiduciary relationships can be a difficult prospect. Nevertheless, because fiduciary relationships remain a peculiar construct in the otherwise fairly rigid framework of western law, fiduciary relationships remain "a concept in search of a principle" (Mason 1985: 246). Absence of universal principles has resulted in courts relying upon principles arising from established lists of categories of relationships which are legally recognized to be fiduciary in nature. This is despite the fact that those categories are never supposed to be closed (*Frame v. Smith* 2 S.C.R. 99 [1987]). For this reason the discussion will now turn to the deliberation of this subject in the Supreme Court of Canada for clarification of the issue.

5.2 Under the Lens of the Supreme Court of Canada

Frame v. Smith began as a tort action where a man sought damages that resulted from the negligence and deliberate harmful action of his former wife. His wife, who was granted custody of the children, had managed to keep him from their three children after their separation despite an order that granted the man access to the children. All attempts by the husband to access his children were foiled: letters were intercepted; phone calls were forbidden; the children were moved to distant cities without notification and their surname and religion was changed to avoid being followed. The father claimed that the relationship with his children was destroyed and that he suffered severe emotional and psychological distress because of the actions of his former wife. During the trial, the Court decided to have counsel for both sides to submit opinion regarding whether the actions of the wife could be considered a breach of fiduciary duty. However, upon receipt of the submissions the Court became divided on the question of whether the wife did in fact hold a fiduciary obligation to the father. In the end the majority judgement of the Court proclaimed that the statutorily authorized access order did not give rise to a fiduciary relationship because a comprehensive scheme had been devised by the legislature for maintaining accountability at law. However, in a powerful dissent, Wilson J. went to considerable lengths to illustrate how the relationship was fiduciary, and in the process thoroughly examined the characteristics of fiduciary relationships.

Wilson J. (para. 60) suggests that relationships which have been found to be fiduciary seem to possess three general characteristics:

1. The fiduciary has scope for the exercise of some discretion or power.

2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

In the view of Wilson J. (para. 77-85) all these components were present in the relationship between the non-custodial and custodial parents in the case and therefore the fiduciary duty should have been extended to the relationship. This way the non-custodial parent could transcend the limited and inappropriate statutory remedies available and would have access to the powerful remedies in equity to seek just compensation for damages suffered. Noteworthy in Wilson's judgement is the primary importance of discretion or power and the ability to exercise that discretion in such a way as to negatively or positively affect the interests of the beneficiary.[53] Also, Wilson sees legal and practical interests susceptible to vast discretionary power as being an important factor in the evaluation of the relationship. However, Wilson J. qualifies this exercise of power as being *unilateral* in nature.

In *Lac Minerals Ltd. v. International Corona Resources Ltd.* (2 S.C.R. 574 [1989]) some of the above questions were addressed by the Supreme Court. International Corona Resources Ltd. (Corona), a junior mining company, had carried out exploration and made arrangements to attempt to purchase a promising property for the purposes of mining it. Representatives from Lac Minerals Ltd. (Lac), a senior mining company, read the preliminary results in a public newsletter and immediately arranged to visit the prospective property. Excited by the interest in the property, Corona revealed the confidential geological findings and theory of the site to Lac representatives. The matter of confidentiality was not raised and in subsequent discussions regarding development and financing options Lac advised Corona to aggressively pursue the property. Lac then proceeded to acquire the property, without informing Corona of the acquisition.

In *Lac Minerals* the majority opinion written by Sopinka J. held that the relationship was not fiduciary in the circumstances. According to Sopinka J. (para. 32), when the Court is dealing with one of the traditional categories of fiduciary relationships the characteristics needed for the relationship to be fiduciary are assumed to exist. However, when operating outside of accepted categories (as was circumstance at bar) the Court must consider what ingredients make up a fiduciary relationship. For direction the Court turned to the three characteristics of a fiduciary relationship forwarded by Wilson J. in *Frame v. Smith.*

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[53] However it should be mentioned here that inequality of power need not exist outside the confines of the relationship itself. As Weinrib (1975:6) points out, "the fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement".

Although the Court supported the general formula presented in *Frame v. Smith*, it preceded its discussion by pointing out that all three characteristics need not be present in a relationship to give life to a fiduciary obligation, nor does the presence of all characteristics necessarily guarantee the existence of such relationship (para. 33). However, the Court did determine that one characteristic must be present in any fiduciary relationship: vulnerability (para. 34). In context of the relationship between Lac and Corona, the Court held (para. 51):

> ...a dependency of this type did not exist here. While it is perhaps possible to have a dependency of this sort between corporations, that cannot be so when, as here, we are dealing with experienced mining promoters who have ready access to geologists, engineers and lawyers. The fact they were anxious to make a deal with a senior mining company surely cannot attract the special protection of equity.

But not all members of the Court were in agreement with this analysis. In a powerful dissent, La Forest J. (para. 169) maintained that unless the Court is attempting to define new categories of fiduciary relationships, vulnerability should not be of central importance in finding a fiduciary relationship between parties. Because the issue before the Court in *Lac Minerals* was not whether 'arms length commercial dealings' were an established and acceptable category of fiduciary relationship, the nature of the relationship between Lac and Corona should have been determined by examining the specific attributes of that particular relationship, and then measuring the vulnerability therein (para. 148), though it is important to emphasize that vulnerability need not be a pre-existing attribute and can arise from the nature of the interaction between the parties (Rotman 2004:227).

Discretionary control over the interests of another is the basic ingredient of a fiduciary relationship (*Wewaykum Indian Band v. Canada*, S.C.C. 79 [2002] at para. 80). However, this concept is not limited to vulnerability in the sense of being vulnerable before entering a relationship or being in complete subjection to the discretionary power of another; although some degree of vulnerability to misconduct, ineptitude or satisfaction of reasonable expectations is a usual component of discretionary control. So for example, according to LaForest J. in his dissenting opinion in *Lac Minerals*, if one party "stands in relation to another such that it could be reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that other" (para. 171). Within the confines of the relationship between Corona and Lac, Corona had a reasonable expectation that Lac would not use the confidential information shared with them in such a way as to jeopardize the interests of Corona. The potential to impact those interests imposed a fiduciary duty upon Lac to not to use the information to derogate from Corona's interests. In La Forest's view, when Lac purchased and retained Corona's prospective property it was in breach of its

obligation to Corona and should have been subject to appropriate remedies under equity. The opinion of the Supreme Court of Canada seems to have taken a new direction since *Lac Minerals*, one more in line with La Forest's perspective.

In *Hodgkinson v. Simms* (3 S.C.R. 377 [1994]) the Supreme Court again visited the subject of fiduciary relationships and gave further clarification on the criteria to be used for denoting fiduciary relationships. Here, the plaintiff was a stockbroker who invested a large sum of money in a real estate venture. When the real estate market collapsed, Hodgkinson lost over three hundred thousand dollars and decided to retain legal counsel. Hodgkinson's lawyer recommended an action against Simms, an accountant, who had recommended the real estate venture to Hodgkinson and who also had a vested interest in the that same real estate venture. Hodgkinson's argument was that Simms was in breach of a fiduciary obligation to him and should be made to indemnify all losses sustained by him. The factual thrust of the fiduciary argument put forward by Hodgkinson was that he had sought independent advice from Simms and was unaware that Simms had a professional relationship with the developers in the recommended real estate venture. In fact, Simms' relationship with the developers was such that he received a bonus from the developers each time one of his clients invested in venture.

Writing for the majority, Justice La Forest (this time with Sopinka J. in dissent) agreed with the argument put forward by Hodgkinson and awarded him full indemnification of his losses. Even though Hodgkinson was a fairly sophisticated businessman and was not totally oblivious to the risks of investing money in real estate, the Court found that he was relatively vulnerable to Simms because of the pervasive discretion held by Simms over his money within the confines of that particular relationship. Thus, vulnerability in the relationship depends upon each party's reasonable expectations about whether they are acting in the best interests of the other party, as opposed to acting in their own best interests. These 'reasonable expectations' of the parties should in turn be determined with reference to the undertaking in the relationship between the parties (pp. 409-410):

> In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter in issue ... thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

Reliance on reasonable expectations is a substantial step away from the unilateral exercise of power advocated by Wilson J. in *Frame v. Smith*[54] and also represents an important distinction in *Hodgkinson*. In *Frame v. Smith* and *Lac Minerals* undertaking was not given explicit importance in ascertaining whether the relationship is fiduciary.

In summary, the progression of the Supreme Court's thinking around fiduciary relationships reveals that undertaking and the resultant expectations of the parties in a particular relationship is the stellar mass of doctrine around which all other factors orbit. Duty is correlative with discretion—power is balanced with responsibility.[55] Of course, other factors do contribute to delineating the parameters of a particular fiduciary relationship and the relative importance of each of these 'satellite' factors may change case to case. But expectation and undertaking are the pillars on which all other factors rest. One effect of this more expansive approach has been recognition of certain categories of fiduciary relationships previously unknown to fiduciary law. Such is the case with the Crown-Native relationship, which will be discussed in greater detail later in the paper.

5.3 Breach of Fiduciary Duty

A beneficiary may initiate an action for breach of fiduciary duty simply by alleging that their fiduciary is in breach (Ellis 1988:1-4)).[56] "[A] breach is found where a fiduciary obligation exists and the fiduciary has deviated from the standard of care that is required in [particular] circumstances or where there is a potential for harm or loss to the beneficiary effected by the fiduciary's conduct" (Rotman 2004:227). Once breach is alleged, the

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[54] For Sopinka and McLachlin JJ. however, vulnerability remained central to creation or continuance of any fiduciary relationship, and should not be relegated to the sidelines, dependent upon the 'expectation' of the parties (pp.467): "Phrases like 'unilateral exercise of power', 'at the mercy of the other's discretion' and 'has give over that power' suggest a total reliance and dependence on the fiduciary by the beneficiary. In our view, these phrases are not empty verbiage. The courts and writers have used them advisedly, concerned for the need for clarity and aware of the draconian consequences of the imposition of fiduciary obligation."

[55] Flannigan (1989: 320): "It is the particular nature of the factual structure, rather than some more vague notion of the general 'character' of the typical relationship, which defines the fiduciary obligation applicable in each case...(e)very actual relationship will then attract the obligation which is suited to its real structure."

[56] One may ask who in fact would have the onus to prove a relationship is fiduciary. The answer to this question would surely differ with respect to the nature of the circumstances of the relationship. For example, as discussed above, a Court may recognize a relationship as fiduciary by analysis of factual information before it, or may impose fiduciary requirements upon the relationship for the purposes of remedy. In that case, there is no onus *per se*, but rather a recognition by a court. Likewise, there may be some circumstances where the relationship between the parties is recognized as one of the established categories of fiduciary relationships, in which case a fiduciary component may be assumed; on the other hand, if the relationship is outside these categories, one party may attempt to argue that the specific circumstances at hand deserve resolution through equity. In the latter case, the onus would surely be upon the claimant party.

fiduciary is burdened with the onus of proof to rebut the charges and is subject to a presumption of wrongdoing. This precept, also known as 'the reverse onus', follows naturally from the strict standard of utmost good faith incumbent upon the fiduciary. It reflects an acknowledgement of the courts of the extreme power imbalances that are inherent in fiduciary relationships as well as the power of the fiduciary to conceal inappropriate actions and the evidentiary challenges and capacity issues that may exist for disadvantaged beneficiaries (Rotman 1996:183). To rebut the allegation of breach the fiduciary must prove to the Court that he/she has acted solely in the best interests of the beneficiary. The court's role is to simply confirm or deny the claim of the beneficiary, and, where the claim is justified, to apply the appropriate remedy. Generally, judicial review of fiduciary action in traditional fiduciary relationships has focused upon and may be expressed in two rules or proscriptions: 1) the 'profit rule' and 2) the 'conflict rule' (McCamus 1997:108).[57] The profit rule operates to ensure that he/she who occupies a fiduciary position does not personally profit from his/her position The conflict rule ensures that the fiduciary does not place himself/herself in a position where the duty to the principal is in conflict with the self-interest of the fiduciary. As Rotman notes (2004:227), "A breach of fiduciary duty occurs simply by virtue of action or inaction that is inconsistent with the high standards of integrity, selflessness, and utmost good faith required of fiduciaries".

A classic example of a case where both rules were breached in a fiduciary relationship exists in *McLeod and More v. Sweezny* (2 D.L.R. 145 (S.C.C.) [1944]). In this case, the defendant had been hired by the plaintiff to stake asbestos mineral claims on their behalf as part of a profit sharing agreement. The defendant truthfully reported back that there were no asbestos claims in the area. What he failed to mention was that while employed to look for asbestos, he had discovered rich chrome deposits. After the plaintiff's claims expired, the defendant returned the area and staked claims for himself on the chrome deposits. The plaintiffs brought the action for their share of the profit earned by the sale of the defendant's claims. In looking at the specific relationship between the two parties the Court found that the nature of the defendant's undertaking was such that the he was under an

[57] I have chosen to treat these rules as separate entities for the purposes of discussion; however, it should be noted that in fact there continues to rage a conflict in the literature both whether these two rules are in fact separate and the nature and purpose of the rules themselves. Shepherd (1981:150) suggests that regardless of the philosophical posture of individual scholars, "...the main rules in the law of fiduciaries, which are... evidentiary rules created solely for the practical purposes, are directed at the determination of whether a fiduciary has actually chosen against his duty. They are not in any respect based on a prohibition against conflicts of interest, nor on a rule against profiting from one's fiduciary position. Both rules are red herrings." Differences or similarities are irrelevant, as the reason for them does not change: to protect the sanctity of the relationship in question generally and to protect the interests of the beneficiary specifically.

obligation to reveal the nature of all deposits found, not just those of asbestos even though those were specific subject of the agreement. As a remedy, the Court imposed a constructive trust on the defendant, with 75 % of the proceeds of the sale going to the plaintiffs.

In *McLeod and More v. Sweezny* there is a clear example of how the expectations of the parties combined with the undertaking of the defendant to verify the fiduciary nature of that specific relationship.[58] Vulnerability was present, but existed more as a by-product of the reasonable expectation of the plaintiff that the defendant would carry out the undertaking incumbent upon him. Breach occurred when the defendant profited as a direct result of his fiduciary position, which placed him in conflict with plaintiff's interests. Interestingly, in *McLeod* the plaintiff did not even incur any direct injurious effects as a result of the actions of the defendant. In fact, the actions of the defendant could have very well gone unnoticed by the plaintiff.[59] However, so powerful is the conflict rule, that even if a fiduciary places himself/herself in a position where a profit may be made at the expense of the principal the fiduciary may be in breach of duty, even where no damages are suffered by the beneficiary (Ellis 1988:1-4). Fiduciaries are expected to put the interests of their beneficiaries above all others—including their own—within the specific parameters of the relationship (Rotman 1996:184).

Hence, the conflict and profit rules cooperate to govern the pervasive discretion of the fiduciary. Offering additional protection to beneficiaries is the fact that fiduciaries are under an obligation to fully disclose to their beneficiary all actions pertaining to the relationship.[60] The duty of full disclosure ensures transparency in the actions of fiduciaries and, when adhered to, it is a mechanism beneficial to both parties. Beneficiaries can observe their interests being cared for and fiduciaries are reassured knowing that full disclosure and consent may release them from liability in the event that there are damages to the beneficiaries' interests. Conversely, any action that goes unreported may be called into question and undergo intense judicial review. Failure to fully disclose can result in breach even where the beneficiary has not sustained damages. In this sense, full disclosure gives the fiduciary relationship a certain proactive quality. If one were to gauge breach only in terms

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[58] Whether the parties realized they were entering a fiduciary relationship is largely irrelevant as intention to create and maintain such a relationship is not pivotal in the ultimate finding of such a relationship. See *Huff v. Price* (76 D.L.R. (4th) 138 (B.C.C.A.) [1990]) at 171; *M(K) v. M(H)* (96 D.L.R. (4th) 289 (S.C.C.) [1992]) at 324 for further discussion.

[59] Arguably, the defendant would have been in breach even if he himself did not benefit from the claims, through his inaction to proactively protect the interests of the beneficiary when he had the power to do so. This 'breach through inaction' will be discussed further below in regards to Aboriginal rights and Crown management of traditional lands. Flannigan (1989:9): "(s)o strict is the obligation that it requires the disgorging of a profit even when that profit is not made at the expense of the trusting party".

[60] For discussion see Ellis (1988).

of profit taking and conflict of interest, by the time judicial review discovers the breach the damage to the beneficiary may be substantial, perhaps of a kind that really cannot be remedied through monetary remuneration, regardless of the size of the award.

Where there are damages from not fully disclosing all information and actions that could impact the beneficiary, a fiduciary cannot claim that the information was irrelevant or that he/she did not know the value of disclosing it to the beneficiary.[61] Intention to harm is irrelevant in finding breach and liability against a fiduciary (Lehane 1985:95-96).[62] Ellis (1988: 1-3,1-4) states:

> It is the fact of a departure from adherence to the beneficiary's best interests, rather than an evaluation of the fiduciary's motive in the departure, that constitutes a breach of fiduciary duty. It is in this sense that the absence of malice will not validate a repugnant act…(e)ven where the fiduciary acts in good faith and in fact reaps a profit for the beneficiary, then, his actions will constitute a breach of fiduciary duty where he places his own interests ahead of, or equal to, the party to whom he owes the duty. The single mindedness of his intentions must be directed towards the beneficiary to the detriment of his own self-interest.

Motive and intention can also be irrelevant in the formation, maintenance and conclusion of a fiduciary relationship.[63] Again, the key is discretion on the part of one party in relation to the other, governed by the reasonable expectations and undertaking within the relationship. A fiduciary also cannot intend to avoid his/her duties by inserting exculpatory clauses into contracts or wills so as to protect his/herself from liability (DeMott 1988:923; McGhee

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[61] Finn (1992:22) relays the words of Lord Thankerton in *Brickenden v. London Loan & Savings Co.* (3 D.L.R. 465 [1934] at 469): "When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by the other party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant."

[62] An oft-cited Privy Council Decision illustrating the operation of full disclosure is *Harrison v. Harrison* (14 Gr. 586 (P.C.) [1868]). In *Harrison*, a trustee invested trust funds in a particular bank stock. Meaning to sell some of his own stock anyway, the trustee created a mutually advantageous situation where the stock purchase would be partially composed of his holdings. The beneficiary of the trust had consented to the purchase of the bank stock, but was unaware that the trustee had become a vendor in the transaction, topping up the order. The bank failed and the beneficiary suffered loss. The Court ordered that sale be set aside and put the losses of the failed bank stock on the trustee. Hence, the good intentions of the beneficiary were irrelevant, overshadowed by the failure to perform the duty of full disclosure. For discussion see McGhee (2000:619); *Nocton v. Lord Ashburton* (A.C. 932 [1914]).

[63] In *McLeod*, the defendant was found to be in breach even though the acquisition of the chrome claims and their sale were made when the defendant no longer had any professional association with the plaintiff. Although the business relationship between the two parties had come to an end, equity continued to monitor the fiduciary thereby ensuring the interests of the beneficiary would not be compromised.

2000:323). Because any such clause could in no way serve the interests of the beneficiary, attempting to insulate oneself from liability could itself be a breach of duty.[64]

Often a fiduciary may be engaged in relationships with several beneficiaries and, on occasion, the interests of the beneficiaries may conflict. Fiduciaries are not permitted to breach obligation to one beneficiary by citing a competing duty to another (*Kruger v. R.*, 17 D.L.R. (4th) 591 (F.C.A.) [1985] at 607-608).[65] Rather, they are expected to deal equally with each beneficiary, attempting to balance those interests. Full disclosure must be made to each beneficiary of all actions that may impact the relationship. Unless otherwise agreed, each beneficiary may assume that they personally have the full loyalty of that same fiduciary (Finn 1992:24). Aside from the fully informed consent of each beneficiary, the fiduciary cannot place himself in a position to which he owes a duty to another which is in conflict to the interests of his principal (Finn 1992:24). In this sense full disclosure also acts as a preventative measure, ensuring that the fiduciary will not engage in a situation where a choice must be made between conflicting duties (Finn 1992:24):

> The purpose of the disclosure is to appraise each client in turn as to the extent to which the fiduciary's exertions on his behalf will or may be qualified or compromised, so that each client in turn can then determine whether, in view of the adverse and possibly qualified representation, he should permit the fiduciary to continue to act in the matter.

Traditionally, the courts have viewed as repugnant any situation where a duty is owed to two or more beneficiaries whose interests conflict and fiduciaries that have a duty to a beneficiary may be found to be in breach of duty simply by placing themselves in another relationship where conflict might occur, even where no damages are sustained. This speaks to the special proactive and preventative nature of the fiduciary duty. As Ellis (1988:1-5) notes:

> Entering into a potential conflict of interest is a breach whether or not the conflict is operative; once such a conflict becomes operative to jeopardize the beneficiary or his property, the fiduciary breach would then give rise to the remedies available in law. The point is important; to wait until damage or prejudice actually occurs is to prejudice the beneficiary's right to utmost loyalty and avoidance of conflict. If such a schism in the theory is allowed, the law would be encouraging a finding that the duty "piggy-backs" the damage caused rather than premising on the basis of duty.

Where such a situation exists, a fiduciary may choose to transfer some or all of his/her powers to another. This allows the fiduciary to avoid a situation where he/she might be tempted to compromise the interests of one of their beneficiaries. However, as general

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[64] For further discussion see DeMott (1988), generally.
[65] Obviously the nature of this requirement changes with respect to the special trust relationship, as will be discusse further below.

precept of fiduciary law, even though fiduciaries may transfer some or all of their powers in relation to their principal, they cannot divest themselves of all their obligations to their beneficiaries (Rotman 1996:188-189). Hence, even where the original fiduciary had no power after the transfer to prevent impropriety on the part of the appointed fiduciary, he/she would nonetheless share in the liability. The rule operates as a safety valve, ensuring that any delegation of duty will undergo intense consideration by the original fiduciary.

5.4 Remedy

Once breach of fiduciary duty is discovered remedial measures may be applied.[66] Categories of fiduciary relationships are not closed and remedy for breach of a fiduciary duty is tailored to the factual foundation of the relationship itself. Therefore Courts are careful not to lean too heavily upon other areas of law for an ultimate determination of adequate remedy (DeMott 1988:885-888; Sheppard 1981:119-123).[67] Weinrib (1975:20) suggests a sliding scale of remedy:

> The sledgehammer approach of having the whole range of remedies available upon a breach of fiduciary duties may be justifiable in connection with the tainted exercise of discretion to advise or negotiate, where values are deeply ingrained and crystallized. The broader context of fiduciary activity is, however, too delicate to be well served by so blunt an instrument. Here there is no substitute for a realistic weighing of the competing social interests at play, and the concomitant of this should be flexibility in the assessment of the sanction. In particular, the imposition of a constructive trust which gives the principle a proprietary interest in the gains and their fruits should be recognized as a drastic sanction... Application of the available remedies in a graded manner dulls the temptation to introduce flexibility, as some United States jurisdictions have done, by open utilization of punitive damages... The natural corollary of this, however, is that the courts should use the constructive trust in the same way that they use punitive damages, that is, with an eye to the degree of wrongdoing involved.

Although 'satellite' factors such as vulnerability, discretion and power-imbalances are irrelevant to the recognition of fiduciary relationships they are vital to the determination of

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[66] An in depth discussion of all remedies available for every conceivable breach of duty is far beyond the scope of this paper. However, some include (Rotman 1996:196): "Potential remedies which may be invoked...include restitutionary, personal, proprietary, and deterent remedies. These may include equitable remedies – such as constructive trust, injunctions, declarations, prohibitions, resicision, accounting for profits, repayment of improperly used moneys (plus interest), equitable liens, equitable damages, and *in rem* restitution – and/or profiteering, economic duress, negligent misrepresentation, or third party liability."

[67] For example, DeMott (1988:888) notes: "The general goal of contract damages, in short, is to compensate the plaintiff for loss of an expected advantage. The law of fiduciary obligation calculates damages from a very different perspective. That perspective dictates that the plaintiff is entitled to recover specific restitution of any benefit that the defendant obtained through his breach or, if specific restitution is not feasible, money damages that quantify the defendant's benefit."

appropriate remedy.[68] Intent may also be critical to the determination of an appropriate remedy for breach of duty (LeHane 1985:107).[69]

Where there has been no loss to the beneficiary, but a fiduciary has nonetheless breached his/her duty through wrongful gain, the proceeds of that gain must disgorged to the beneficiary. Focus is on punishing the fiduciary's action as opposed to fair restitution for the beneficiary (*MacMillan Bloedel Ltd. v. Binstead* 22 B.L.R. 255 (B.C.S.C) [1983]):

> The difficult and contentious issue, is not that of liability but rather of consequences flowing therefrom. Where there has been a breach of fiduciary duty, as in the present circumstances, the law calls upon the defendants to account to the plaintiff for any profit made or benefit received as a result of the breach of duty. This is not the same as paying damages, which are compensatory in nature. The purpose of damages is to put the plaintiff in the same position it would have been in if not for the wrongdoing. Here the plaintiff suffered little damage and will be in a better position than it would have been if not for he wrongful act of the defendants.

Where the beneficiary incurs damages, the benefits acquired through wrongful gain by the fiduciary may be awarded in addition to any compensation for those damages. Both of these remedies are also in addition to any remedies stemming from contractual obligations that may have been breached in the process. Finally, the Court may operate with a presumption of maximum value to the benefit to the fiduciary, from which the beneficiary will be compensated (Ellis 1988:20-10.1).

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[68] For this reason remedy not only differs from relationship to relationship, but may also may change over time within a relationship. An example may be where a fiduciary slowly relinquishes power to a beneficiary over time (perhaps in a case where an infant foster child grows into a young adult), and the ability of the fiduciary to disclose actions and seek approval increases, liability for damages therein will necessarily be reduced.

[69] Nevertheless, although the Court may consider the intent of a fiduciary in the award of damages, they will not entertain a argument which claim that loss to the beneficiary was inevitable, despite the breach (Ellis 1988:20-5). This is an important distinction, because it is reaffirmation of the priority and importance of the interests of the beneficiary in any calculation of breach or remedy: a beneficiary in a fiduciary relationship must not be left without remedy, regardless of the intent of their fiduciary. Such an allowance would be direct breach of the first and foremost maxim of fiduciary law (McGhee:2000:27-29): "Equity will not suffer a wrong to be without a remedy".

6. Application of Fiduciary Law to the Crown-Native Relationship in Canada

6.1 Recognition of the Relationship

In 1984 the Supreme Court of Canada recognized the fiduciary nature of the *sui generis* federal Crown-Aboriginal relationship in Canada in *R. v. Guerin* (2 S.C.R. 335 [1985]).[70] *Guerin* involved a dispute between the Musqueam Indian Band and the Crown, represented by the Department of Indian Affairs. On October 6, 1957 the Band surrendered 162 acres of land in trust to the Crown. The surrender was preceded by substantial Crown consultation with external advisors and appraisers concerning the value of the lands and negotiation between the Crown and a neighbouring golf course, interested in leasing the lands to expand their operations. Throughout the process the Crown informed the Band council of the progress in the negotiations and consulted them on the terms that should govern the lease. The Musqueam were under the impression that the lease would reflect terms specified by the Band council only days before the surrender, at a September 27 meeting. However, by January 1958 the Crown had entered into a 75-year lease with the golf course with terms substantially less advantageous to those originally agreed upon by the parties or suggested by the external advisors. Despite repeated requests, the Band was not even provided with a copy of the terms of the lease until 1970. A representative action was initiated by the Chief of the Musqueam Band seeking substantial damages and a declaration that the Crown was in breach of its 'trust responsibility' in respect of the lease.

At trial (10 E.T.R. 61 (F.C.T.D.) [1981],[71] Collier J. awarded ten million dollars in damages for breach of trust. In his view, given the nature of the language and provision of section 18 of the *Indian Act (*R.S.C. 1952, c.149) generally, and the terms of the surrender of the surrender specifically, the Crown became a trustee once the lands were surrendered by the

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[70] Although the fiduciary nature of the Crown-Aboriginal relationship was first given explicit recognition and consideration in *Guerin*, this is not to suggest that the relationship had never been at least considered trust-like before that time. In *Cherokee Nation v. Georgia* (30 U.S. (5 Pet.) 1 [1831]) Chief Justice Marshall of the United States Supreme Court in the United States viewed the relationship as 'guardian and ward'. In Canada, the guardian-ward categorization was given explicit mention in the 1939 decision *Re Kane* (1 D.L.R. 390 at 397 (N.S. Co. Ct) [1940]). In 1950 the Supreme Court of Canada recognized the trust like nature and language of the *Indian Act* as a statutory recognition of the trust like nature of the Crown-Aboriginal relationship in Canada in *St. Ann's Island Shooting and Fishing Club Ltd. v. R.* (S.C.R. 211, 2 D.L.R. 225 [1950]). Interestingly, post 1950 legislation substituted the term 'trust' to describe the Crown method of holding lands for Native people for the term 'use and benefit'. At any rate, regardless of the trust-like characteristics of the relationship, the Crown was not viewed as having a legally enforceable duty to Native people; rather, the nature of the 'duty' was moral or political at best and, similar to the contemporary concept of Aboriginal title, viewed as existing at the 'good will' of the sovereign. For discussion see, generally, Johnson (1986) and Bartlett (1979).

[71] With additional reasons at 127 D.L.R. (3d) 170 (F.C.T.D.) [1981]).

Band. On appeal (2 C.N.L.R. 20 (F.C.T.D.) [1982]), the Court focused its analysis on the Crown relationship to unsurrendered reserve lands, generally, rather than examining the nature of specific surrender at hand. In doing so, the Court found that powers and discretion regarding reserve lands and the trust-like nature of the language in the *Indian Act* and the specific terms of the surrender did not constitute an equitable and legal obligation on the Crown.

There was no majority judgement in the Supreme Court (2 S.C.R. 335 [1985]) decision in *Guerin*.[72] However, there was general agreement that, at least within the circumstances of the case at bar, the Crown was under a legal rather than moral or political duty to Aboriginal people. In fact, aside from the judgement delivered by Estey J, which characterized the Crown-Aboriginal relationship as an agency,[73] there was also agreement as to the nature of the duty, though there was substantial disagreement to its source. In the end, there was consensus to reinstate the decision of the trial judge, including the award of ten million dollars in damages to the Band.

Because the case centred on the surrender of reserve lands to the Crown, all members of the Court felt it necessary to address nature of the Aboriginal interest in unsurrendered reserve lands in order to determine the relationship and responsibility of the Crown when those lands are surrendered.[74] The judgements of both Dickson J. (at pp. 386) and Wilson J. (at pp. 349) concur, albeit with differing reasons, that at least with respect to unsurrendered reserve lands, there was no enforceable trust incumbent upon the Crown. Concerning surrendered reserve lands, Wilson J. (pp. 355) had no difficulty finding a trust:

> There is no magic to the creation of a trust. A trust arises, as I understand it, whenever a person is compelled in equity to hold property over which he has control for the benefit of others (the beneficiaries) in such a way that the benefit of the

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[72] The decision is represented by three distinct judgements: Dickson J. with Beetz, Chouinard and Lamer JJ. concurring, Wilson J. with Ritchie and McIntyre, and Estey J. agreed in separate opinion with certain parts of Dickson J.'s judgement (ensuring majority opinion was delivered on certain issues raised in the judgement where those opinions diverged from those presented in Wilson J.'s judgement). Laskin C.J.C. took no part in the judgement.

[73] The judgement of Estey J. in *Guerin* has been generally ignored, given the fact that an agent would be required to seek out and obey the instructions of his principle, which of course is a far cry from the actual relationship describing the Crown and Aboriginal peoples in Canada, especially given the tremendous Crown discretion and power in the management and control of Indian lands in the *Indian Act*. For discussion see Bartlett (1989:323).

[74] According to the *Royal Proclamation, 1763* (R.S.C. 1985, App. II, No.1.) Aboriginal title can only be surrendered to the Crown: "...We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of and Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name..." The provision addressed the "great frauds and abuses" being committed against Indians in the Colonies at the time and served as a framework for both recognising and extinguishing the underlying burden of Aboriginal title on lands which the Crown had exerted sovereignty.

> property accrues not to the trustee, but to the beneficiaries. I think that in the circumstances of this case as found by the learned trial judge the Crown was compelled in equity upon the surrender to hold the surrendered land in trust for the purpose of the lease which the band members had approved as being for their benefit. The Crown was no longer free to decide that a lease on some other terms would do. Its hands were tied.

In Wilson J.'s view, the underlying burden of Native title merged with the fee, creating a situation where any interest was extinguished, but where the Crown was nonetheless subject to a trust to the lease of the lands on the terms discussed and agreed upon by the Band (at pp. 353). But Dickson J. viewed the matter from a very different perspective. Dickson J. (at pp. 386) purported to agree with Le Dain J. in the Appeal decision, that the Indian interest in reserve lands disappeared[75] upon surrender, and therefore could not constitute the focus or "corpus" of a trust. Interestingly, the judgement of Le Dain J. had in fact stated that the Indian interest did not disappear and could be the corpus of a trust (Bartlett 1984-5:371).[76]

According to Dickson J., the general inalienability of Aboriginal title and the statutory framework in place to govern its disposition is the source of a *distinct* legally enforceable, equitable obligation on the Crown to deal fairly on behalf of the surrendering Band (pp. 376). Further, he characterized the nature of Aboriginal title, the relationship between the Crown and Aboriginal people and the obligations that flowed from that relationship as *sui generis*. At its core, this argument suggests that a 'distinct obligation' is triggered upon the surrender of reserve lands due to the operation of s.18 of the *Indian Act* and an inherent limit on Indian title, namely that it is inalienable except to the Crown.

In *Sparrow* (1 S.C.R. 1075 [1990]), a Musqueam Indian was charged under the *Fisheries Act* (R.S.C. 1970, c. F-14, ss. 34, 61(1)) with fishing with a drift net longer that was allowed by the terms of the Band's Indian food fishing licence. The defendant argued that he was exercising an Aboriginal right to fish and that the net length restrictions as outlined in the license were at odds with the special protections entrenched in s.35(1) of the *Constitution Act, 1982*. The issue before the Court was whether s.35 placed a limitation on legislative power to

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[75] The early decision *St. Catherine's Milling and Lumber Co. v. The Queen* (14 A.C. 46 (P.C.) [1888]]) had determined that the interest in Indian lands to traditional territories disappeared upon surrender to the Crown through Treaty or agreement. Although the Supreme Court of Canada decision in *Canada (A.G.) v. Giroux* (53 S.C.R. 172 [1916]) proclaimed that the interest in reserve lands did not disappear upon surrender, this point was later overruled by the Privy Council in *Quebec (A.G.) v. Canada (A.G.)* (A.C. 401 (P.C.) [1921]; also known as *Star Chrome Mining*) which applied the logic in *St. Catherine's* to reserve lands. For discussion see Bartlett (1990:68).

[76] Indeed, Bartlett (1989:318) points out that in *Smith v. The Queen* (1 S.C.R. 554 [1983]) the Court found that where reserve lands are surrendered for lease (as in *Guerin*) the Indian interest in reserve lands did not disappear and, even if the interest does disappear at common law, it does not disappear under federal-provincial agreements which govern almost every reserve outside Quebec.

regulate Aboriginal rights to fish and was therefore a unique opportunity to determine both the nature and scope of s.35(1) and the parameters of the federal Crown-Native relationship. *Sparrow* contemplates these issues within the broader context of the reconciliation of the sovereignty of the Crown in Canada with pre-existing Aboriginal societies (para. 49-50).[77]

Whereas in *Guerin* the Supreme Court recognized a specific obligation in the Crown's discretionary control over Aboriginal title and reserve lands as manifested in s.18 of the *Indian Act*, in *Sparrow* the Supreme Court recognized that the Crown's fiduciary duty to Aboriginal people may exist outside the land context (para. 59):

> ...[in *Guerin*] this Court found that the Crown owed a fiduciary duty to the Indians with respect to the lands. The sui generis nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, Guerin together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s.35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in the light of this historic relationship.

When read together, *Sparrow* and *Guerin* suggest that fiduciary duties of the Crown towards Aboriginal people are context-specific and require an analysis of the specific interest at stake within the unique circumstances and relationship in the case under consideration. In *Sparrow* this is articulated in terms of a two-part justification test that must be met where there is legislative infringement of s.35 rights. The Crown must show that there is a valid legislative objective and compliance with its fiduciary obligations towards Aboriginal people.[78] More recently, in *Wewaykum Indian Band v. Canada* (SCJ No. 79 [2002]), there is a clear recognition by the Supreme Court of the existence of fiduciary obligations outside the context of a reserve land and s.35 context. In that case Justice Binnie explained "The fiduciary duty...is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of Aboriginal peoples" (para. 5). However, Justice Binnie also notes that invoking "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Aboriginal relationship is "overshooting the mark" (para. 81). The Crown's fiduciary duty "does not exist at large, but in relation to

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[77] The effect of Canadian sovereignty has been to deprive power from First Nations people, the prior occupants of the soil, and has resulted in a Crown acquisition of a vast power to impact the interests of First Nations people (Slattery 1983).

[78] This will be discussed in greater detail later in the paper. The content of this obligation and whether specific elements such as the duty to consult exist where s.35 rights are not established has been given greater clarity in recent Supreme Court decisions of *Haida* and *Taku*, which will also be discussed in greater detail below

specific Indian interests" (para. 81). The result is that the Crown's duty must be defined with reference to the nature of the relationship at hand and what interests are at stake. For this reason, the identification of the scope of the Crown's fiduciary duty becomes a necessary first step in the process of considering what that duty may entail in a specific context.

6.2 Scope of the Crown's Fiduciary Duty and the Honour of the Crown

Bryant (1993:36) has criticized the ill-defined scope of the fiduciary duty of the Crown, suggesting that the long, complex and unique interactions of the Crown-Aboriginal relationship of the post-contact formative period makes the scope of the duty obscure and difficult to quantify. As a result, Bryant (1993:37) suggests that the scope of the duty should be "based upon the undertaking to recognize and affirm Aboriginal rights in accordance with the general fiduciary standards of 'loyalty, good faith and avoidance of a conflict of duty and self interest'." Slattery (2003) suggests that the broad scope of the fiduciary duty of the Crown involves Crown recognition and maintenance of certain fundamental or 'generic' rights that belong to Aboriginal people, as recognized political and constitutional entities under the protection of the Crown. These rights are uniform in character and have been laid down by the common law of Canada. Examples of such rights are summarized as follows (Slattery 2003):

1) the right to a presumption of Aboriginal title in traditional use areas
2) the right to self government within a broader federal system
3) the right to enter into, negotiate and conclude Treaties
4) the right to enjoy an autonomous legal system
5) the right to engage in and practice sustenance activities such as hunting and fishing
6) the right to make a moderate living by accustomed means
7) the right to cultural integrity
8) the right to expect and rely upon the fiduciary protection of the Crown.

Slattery (2003) perceives this panoply of generic rights to be analogous to those received by the provinces upon joining confederation and under 'terms of union'. Specific rights flow from more general rights. For example, the generic right to cultural integrity may spawn an intermediate right to religious practice and spirituality which in turn may spawn a specific right to practice those rights in a certain area or in a certain way. The role of the Courts in

this framework is to delineate the scope of the specific rights claimed, which are determined on a case-by-case basis.[79]

According to Slattery, the generic right to the fiduciary protection of the Crown is likewise tailored by specific actions of the Crown with respect to a specific Aboriginal group, or through agreement with that group. So, although First Nations may be entitled to a generic right to the fiduciary protection of the Crown, in order to understand or enforce the duty in a specific context, there must be cognizable and clear interests at stake over which the Crown has assumed discretionary control. The protection of generic rights, unproven rights, or rights and interests which are not fully understood would not likely qualify as specific Indian interests that would warrant the fiduciary duty to be triggered. This coordinates with the Supreme Court judgement in *Wewaykum Indian Band v. Canada* (S.C.C. 79 [2002]).

In *Wewaykum*, two Bands of the Laich-kwil-tach First Nations in British Columbia claimed each other's reserve lands. Each Band had been in possession of the said lands since the 19th century and both claimed each other's lands on the basis of contemporaneous documentation of the Department of Indian Affairs. Both Bands claimed that, had it not been for the Crown breach of fiduciary duty in creating the reserves, they would be in possession of both reserves. The Bands sought declarations against each other and equitable compensation from the federal Crown due to the breach of fiduciary duty. The Court emphasized that the fiduciary duty owed by the Crown varies with the nature and importance of interest to be protected rather than an all-encompassing duty that affects every action of the Crown. In the case at bar, the Court noted that Crown had certain duties with respect to the creation of reserves for the Bands. The Court said that in the period that characterized the creation of the reserves, the Crown exercised a public law duty under the *Indian Act* which was subject to Court supervision and public law remedies.

In *Wewaykum*, the Court notes that the existence of a public law duty does not exclude the possibility of a fiduciary relationship (para. 85):

> The latter, however, depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty"...

In exercising public law duties the Crown must act "with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter

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[79] Macklem (1997-1998) similarly groups Aboriginal interests recognized and affirmed in s.35 under the categories of Aboriginal identity, Aboriginal territory and Aboriginal sovereignty, and suggests that s.35 rights have positive dimensions which can expect the performance of purposive and proactive obligations by government to safeguard, protect and if necessary compensate their infringement.

and with "ordinary" diligence in what it reasonably regarded as the best interest of the beneficiaries" (para. 97). Where there is more than one First Nation beneficiary, the Crown's duty requires that it be "even handed" (para. 97). Rotman (1996:227) argues that an emphasis on undertaking is incorrect given that the Supreme Court has already made it clear that the existence of fiduciary obligations are not dependent upon undertakings, but may arise equally from the parties' conduct. Also, as noted above,[80] once a "category" of relationship is established where fiduciary obligations are recognized to exist by the Court (i.e. the Crown-Native relationship), undertaking becomes less important because the characteristics required to give life to a fiduciary duty may be assumed to exist.

In *Wewaykum*, the Court emphasizes that the duty does not exist at large but in relation to specific interests. So, although the ingredients may be right for the presence of a fiduciary relationship, the duty itself is only activated when specific interests may be negatively impacted by Crown action. In *Wewaykum*, upon the establishment of reserve lands the "content of the Crown's fiduciary duty expands to include the protection and preservation of the Band's quasi-proprietary interest in the reserve from exploitation" (para. 86). But the Court also notes that "...fiduciary protection accorded to Crown dealings with Aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*"(para. 81)—though the Court does not preclude the possibility. The Court also recognizes that when exercising its duty, the government has to consider interests of other affected parties. Therefore, it can't ignore conflicting demands whether these come from competing First Nations or other members of the Canadian public (para. 96).

It is important to look through the surface issues of *Wewaykum* in order to focus on what the Court is really saying: 1) the fiduciary obligation will not apply to every aspect of the Crown-Native relationship and the content of the relationship may vary 2) even where the fiduciary component of the honour of the Crown is activated with respect to specific rights, a strict application of fiduciary law may be lightened when the Crown is confronted with a competing public law duty. *Wewaykum* therefore represents both a step toward the precepts of general fiduciary law in one way, and a step away from them in another. On one hand the Court strengthens the application of private fiduciary analysis by acknowledging Crown discretionary power over cognizable Indian interests and clarifying that fiduciary obligations will not regulate every action of the Crown with respect to Aboriginal people. On the other

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[80] Section 5.1.

hand it clearly notes that sometimes the rules have to be bent to reconcile the simultaneous and competing duties owed to the public at large.[81]

In applying the principles in *Wewaykum*, it is unlikely that the fiduciary duty would be activated with regards to a broad, underlying right such as the "the right of Aboriginal cultural integrity" suggested by Slattery (2003). However, this does not mean that this important concept is left without any recognition or protection under s. 35. Although in *Haida* (S.C.C.) the Supreme Court reiterated the message in *Wewaykum* that unproven rights were "insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary..." (para. 18), the Court did consider the case within the broader construct of the "honour of the Crown" and found that the Crown's honour necessitated the application of certain principles in its dealings with the Haida, including a duty to consult and accommodate their interests. As discussed above, even potential rights may attract a number of principles to ensure the honourable engagement and consideration of the Crown (i.e. in stage one and two of the spectrum). The purpose of the *Royal Proclamation, 1763* and the mutual intentions of the Crown and First Nations in making Treaty 8 was a broad promise to maintain the protection and integrity of a way of life. The fundamental promise was that development may come, but any development would be sustainable and would be balanced fairly with the land based rights and activities on which the cultural sustainability of Aboriginal people depend. Therefore, the honour of the Crown may offer some protection to the broader concepts of the integrity and sustainability of Aboriginal culture.

Arguably, Treaty 8 sustenance rights are sufficiently specific to attract the fiduciary component of the honour of the Crown towards Aboriginal people. But the Supreme Court has clearly held that any fiduciary duties owed to Aboriginal people must be balanced and reconciled with competing duties owed to the Canadian public. In a resource and land management context in northern Alberta, the Crown is often faced with this situation. Crown lands are used by First Nations in the performance of important cultural and subsistence activities promised under Treaty 8; however, the Crown also has an obligation to the public to manage resources in a way which is of benefit to all Albertans. This means it is now

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[81] The situation in Canada is especially precarious, because Canada has operated under what amounts to a 'constitutional supremacy' since the removal of the supremacy of the British parliament, and the very legitimacy of the constitution depends on the ability to balance and fulfil fiduciary obligations of the Crown (Slattery 1992:269-277) at pp. 270: "...whatever its historical origins, the modern Canadian Constitution owes its supremacy to the existence of a fundamental trust that molds and informs our governmental institutions. At the most abstract level, the trust embodies the fundamental doctrine that governments do not possess unlimited powers but are constrained by their intrinsic mandate, which is to govern for the welfare of the people, both those now living and those to be born."

necessary to consider how the Crown's competing duties in these situations may be managed 1) outside of balancing and reconciling the interests of Aboriginal peoples and the general public and 2) within situations of balancing and reconciling those interests.

6.3 Situations Outside of Balancing and Reconciling

In *Blueberry*, the Supreme Court reviewed a claim brought by the Beaver Indian Band of damages for breach of fiduciary obligation of the Crown. The Band, granted a reserve under Treaty in 1916, surrendered the mineral rights to the reserve to the Crown 1940 in 'trust for lease'. In 1945 the Band signed another surrender document which conveyed the whole reserve to the Crown 'in trust for lease or sale' on terms most beneficial to the Band. Around the same time the Director of the *Veteran's Lands Act* was scouting out parcels of land to sell to veterans returning from World War Two. In 1948 the reserve lands were sold to the Director for $70,000. Also in 1948 gas was discovered near the former reserve lands and several oil companies expressed interest in the exploring the area further. By 1949 it was clear that title to the minerals passed with the transfer to the Director and subsequently to the veterans who purchased the land and in 1960 an official of the Department of Indian Affairs stated that the failure to reserve the mineral rights was "inadvertence". By 1976 oil and gas was discovered on the lands. Gonthier J., for the majority of the Court, summarized the breach of fiduciary duty of the Crown in two distinct sources of inaction (paras. 18-23): 1) the failure to reserve mineral rights in the 1948 sale of the lands to the Director of the *Veteran's Lands Act* 2) the failure to use an *Indian Act* provision to reverse the injurious effects of the transfer once those became known. The case was sent back to the Federal Court Trial Division for a final determination of damages which resulted in an award of 147 million dollars to the Beaver Indian Band.

Johnson (1986) suggests that outside of circumstances where the Crown is in a position of balancing public and Aboriginal interests, that the Crown duty is directly analogous to that of a private fiduciary. It is clear in *Blueberry* that the Crown was not in a situation where it was balancing pressing public interests with the interests of the Beaver Band. There was simply no justification for the transfer of the reserve minerals to the Director of the *Veteran's Lands Act*. As such, the Crown found itself in the position of private fiduciary to the beneficiary Band, with equity closely monitoring the relationship to ensure the maintenance of utmost trust. Of special interest is the fact that although the Court clearly recognised the failure of the Crown to reserve the mineral rights as "inadvertence"

(para. 18), this lack of intention to harm the beneficiary could not excuse the fundamental breach of duty. Again, this is correlative with foundational precepts of traditional fiduciary law. Also noteworthy is the fact that both sources of breach found by the majority are essentially rooted in the inaction rather than the action of the Crown. The Court noted that at the very least the Department of Indian Affairs should have acted as a reasonable person would in his or her own interests (Gonthier J. at paras.21-22):

> Given these circumstances, it is rather astonishing that no action was taken by the DIA to determine how the mineral rights could have been sold to the DVLA. Little effort would have been required to detect the error which had occurred. As a fiduciary, the DIA was required to act with reasonable diligence. In my view, a reasonable person in the DIA's position would have realized by August 9, 1949 that an error had occurred...

In this way, if the Crown is not forced into a position of balancing interests, the scope of the Crown duty is analogous to the duty of a private fiduciary.[82]

6.4 Situations Within Balancing and Reconciling

When the Crown is in a position where it is forced to balance and reconcile the interests of the public or the sovereignty of the Crown with the interests of Aboriginal people, its position as a fiduciary is unique. The full burden of private fiduciary law is not placed on the Crown. The core duty of acting as a private fiduciary does not change, but certain aspects of that duty are made dormant in the balancing process and the requirements of discharging that duty materialize in a mutated form.[83] This is the main difference between traditional fiduciary relationships and the Crown-Aboriginal fiduciary relationship.[84] The result may be best described as a *sui generis* fiduciary duty.

The above principle is demonstrated both in cases where the federal government is exercising discretionary powers in relation to reserve lands and the application of the

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[82] This of course is allowing the fact that the Crown would not be held to be in *prima facie* breach just by holding duties to more that one beneficiary at once whose interests may conflict or put the Crown in a position of conflict. Such an allowance is necessary and unavoidable in order to maintain a sort of sanity in the application of fiduciary law to the Crown-Aboriginal relationship, see Bryant (1993) for discussion.

[83] Thus, if in the course of balancing and reconciling the pre-eminent need to balance and reconcile was removed, the dormant aspects of the duty would come out of hibernation, returning the duty of the Crown to its full force and restoring the demanding requirements of discharging that duty as a private fiduciary.

[84] The reader will recall, under traditional fiduciary law a fiduciary must hold the interests of the beneficiary above all others, including his or her own. Conflict and profit situations operate under the presumption of breach of duty, and intention is only relevant in the evaluation of remedy. Also, traditional fiduciary law does not allow a fiduciary to escape liability by claiming competing duties are owed to multiple beneficiaries.

justification test to legislative infringement of s. 35 rights. For example, in *Semiahmoo Indian Band v. Canada* (1 C.N.L.R. 250 [1998]) the Federal Court of Appeal reviewed a claim of breach of fiduciary duty by the Crown in relation to the absolute surrender of part of the Semiahmoo Indian Band Reserve in 1951. The Band alleged that although it did sign the surrender of the valuable reserve lands to the federal Department of Public Works for the expansion of customs facilities, there was no appraisal done of the lands in question prior to the surrender and that their decision was greatly influenced by the knowledge that the department had the power to expropriate the land if a deal was not reached. Further, the surrender removed more land from the reserve than was absolutely necessary for the expansion, did not include a reversionary provision, and, when the land remained vacant and unused for years after the surrender and the Band requested that the lands be transferred back, Public Works refused the request.

Isaac C.J., speaking for the Court ascertained that there was a breach of fiduciary duty. In his analysis the Chief Judge notes (para.37):

> The authorities on fiduciary duties establish that courts must assess the specific relationship between the parties in order to determine whether or not it gives rise to a fiduciary duty and, if yes, to determine the nature and scope of that duty. This approach applies equally in the context of the fiduciary duty owed to Indian Bands when they surrender reserve land. In my view, while the statutory surrender requirement triggers the Crown's fiduciary obligation, the Court must examine the specific relationship between the Crown and the Indian Band in question in order to define the nature and scope of that obligation.

In examining that specific relationship, Isaac C.J. finds distinct breaches of duty in relation to the surrender. He agrees with what the trial judge characterizes as the 'pre-surrender' duty of the Crown—to design the surrender agreement in such a way that it would ensure a minimal impairment of the Band's interest in the lands (in this case the placing of a reversionary clause in the surrender document) and finds a breach of duty of the Crown just by consenting to the surrender, which was on its face exploitative (para. 40-43).[85] In addressing the Crown's assertion that the surrender document is evidence of the Band's full and informed consent to the surrender, he notes (para. 45) "(i)n failing to alleviate the Band's sense of powerlessness in the decision-making process, the respondent failed to protect, to the requisite degree, the interests of the Band."

The Crown assertion of an important public purpose for the lands (expanding the customs facility) and the acquisition of a surrender document for that public purpose did not

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[85] On this note, Issac C.J. further suggests that it is within the fiduciary duty of the Crown to personally scrutinize such a transaction and to prevent such an exploitative bargain.

excuse the Crown from salvaging the remainder of its fiduciary duties to the Band to the greatest extent possible in the rest of its dealings (para. 46):

> The fact that the Trial Judge did not view the $550.00 per acre received by the Band for the surrendered land as "below market value" does not negate the possibility of a breach of fiduciary duty. The focus in determining whether or not the respondent breached its fiduciary duty must be on the extent to which the respondent protected the best interests of the Band while also acknowledging the Crown's obligation to advance a legitimate public purpose. In this case, the Band did not want to surrender the land at all but felt that it had no choice. The respondent consented to an absolute surrender agreement in order to take control of much more land than they required, and they did so without a properly formulated public purpose. For these reasons, I find that the respondent did breach its fiduciary duty to the Band in the 1951 surrender even though the Band may have received compensation for the Surrendered Land somewhere in the neighbourhood of market value.

Isaac C.J. notes that even assuming the public purpose was valid, the Crown should have at the very least attempted to impair the interest of the Band as little as possible in the fulfilment of that purpose which would have amounted to 1) taking the minimum amount of lands possible for the purpose and 2) taking the minimum interest needed in the land to fulfil the purpose (para. 58-60).

Isaac C.J. also found a 'post-surrender duty' incumbent on the Crown to (para. 59) "correct the error that it made in the original surrender for as long as it remained in control of the land." Here, Isaac C.J. looks to the Supreme Court decision in *Blueberry* where the Court found that DIAND should have used its power in s.64 of the *Indian Act* to reverse the inadvertent transfer of the minerals. Although s.64 of the *Indian Act* did not apply in this case, Issac C.J. notes (para. 61):

> This does not mean, however, that absent a provision of this kind, the Crown does not owe a fiduciary duty to an affected Indian Band post surrender. Section 64 was not the source of the Crown's post-surrender fiduciary duty… In this case, the Crown still owns and controls the surrendered land; land which was obtained by the Crown in breach of its fiduciary duty to the Band. In these circumstances, I am of the view that the Crown has a post-surrender fiduciary duty to correct the original breach. It is a post-surrender fiduciary duty which is owed by the Crown, and not simply by DIAND. The fact that Public Works, and not DIAND, is in possession of the Surrender Lands does not mean that the Crown is somehow shielded from its obligation to correct the breach of fiduciary duty committed in consenting to the exploitative bargain that was the original surrender agreement.

Thus, when Public Works failed to return the lands in the absence of a demonstrable and pressing public need for the lands, the Crown breached its 'post surrender duty' (para. 68).

In *Semiahmoo* a serious effort is made to describe and then analyse the scope of the Crown's duties in a situation of balancing and reconciling interests. However, Isaac C.J. gets

perhaps overly caught up in a discussion around 'pre' and 'post' surrender duties and fails to adequately describe the source of those duties.[86] What Isaac C.J. is describing in his analysis is the unique interaction of the honour of the Crown generally and specific fiduciary duties of the Crown with regards to the Semiahmoo Indian Band. A sensible interpretation of those duties is that the Crown is bound by honour to protect the interests of the Band (ensure that the Band is not taken advantage of in an exploitative surrender agreement, and to use all its powers to return the lands if no longer needed, etc.) and is under specific duties by way of the surrender itself (to follow the terms of the surrender, through its power position as the only party to whom the Band can surrender lands, through the subsequent management of the lands, etc.). *Semiahmoo* is a reaffirmation that a valid public purpose does not extinguish the special duty of the Crown towards Aboriginal people. Although the 'valid public purpose' argument had initially excused the Crown from the more stringent criteria of private fiduciaries, once it was apparent that that purpose was bogus the nature of the Crown-Semiahmoo relationship reverted back to the private fiduciary context.[87]

Osoyoos Indian Band v. Oliver (Town) (S.C.J. No. 82 [2001]) also addresses how the Crown's duty may be discharged in situations of balancing and reconciling. Sometime prior to 1925 the Minister of Agriculture of British Columbia arbitrarily decided to construct a concrete canal occupying an area of over 56 acres, which bisected the Osoyoos Indian Reserve, in order to aid in the agricultural development of the South Okanogan. More than 22 years later the government of British Columbia decided to formalize the interests in the canal lands with an Order in Council pursuant to s.35 of the *Indian Act*. In 1961 the canal lands were registered by way of indefeasible title in the right of B.C., and sometime after that date the Town of Oliver assumed the operation and maintenance of the canal. In 1995 the Band Council passed a resolution to have the B.C. Assessment authority assess the canal lands and include them on the 1996 roll of the Osoyoos Band, at the great displeasure of the Town of Oliver. At issue were the rights and entitlements of the parties with respect to the lands taken and therefore the nature of the interest in s.35 of the *Indian Act* and the effect of the 1957 Order in Council. Speaking for the majority of the Court, Iacobucci J. concludes that the Order in Council did not evince a clear and plain intent to extinguish the Band's interest in the lands and that under a precept of minimal impairment of the Band's rights, it

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[86] Part of the reason for this is likely his heavy reliance upon the Supreme Court decision in *Guerin* to inform him of the nature of the Crown fiduciary duty to the Band. As shown above, *Guerin* outlines a specific source of the Crown's duty to Aboriginal peoples, sourced in the powers of the *Indian Act*.

[87] Issac C.J. views the post 1969 period as equitable fraud and suggesting a constructive trust and equitable damages in framing the full restitution to the Band.

formed only an easement over the land occupied by the canal and was therefore 'in the reserve for the purposes of taxation' (para. 90).

Opening his discussion, Justice Iacobucci puts to rest any remaining confusion that had plagued previous judgements,[88] states "the fiduciary duty of the Crown is not restricted to instances of surrender (para. 52)." He advocates that the Crown use a two-stage process to mitigate the conflict between its public duty to acquire the needed lands and its fiduciary duty to the Indians (para. 53). In the first stage, the Crown acts entirely in the public interest to determine what lands might be needed for the public purpose (para. 53). At this stage 'no fiduciary duty exists'. Once the decision to take lands has been made, the fiduciary duties of the Crown 'arise' (para. 53) "requiring the Crown to expropriate an interest that will fulfill the public purpose while preserving the Indian interest in the land to the greatest extent practicable." This two-step process ensures that 1) lands will only be taken when absolutely necessary and 2) that the interest taken will be the minimum possible, maximizing the Indian interest in their lands.

The unique nature of the Crown's obligation as a fiduciary in reconciling interests of Aboriginal people and the broader public is also illustrated in the context of legislative infringement of s. 35 rights. In *Sparrow* the Court outlines a framework for justifiable infringement. The first part of the test (para. 71) considers the validity of the legislative objective, which the Court suggests would involve the scrutiny of the regulations, goals, and purpose of the legislation.[89] If a valid legislative objective is found, then the second part of the test is activated. The second part of the test (para. 75) evaluates whether the objective was pursued in a manner consistent with maintaining the honour of the Crown in its dealings with Aboriginal peoples. Without creating an exhaustive list of all questions that may be considered in part two of the justification test, the Court suggests that several other factors might come into play:

> ...has there been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-conscientiousness and the interdependence with natural resources,

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[88] *Luke v. Canada* F.C.J. No. 529 [1991]; *Apsassin v. Canada* 3 F.C. 20 (T.D.) [1988]; *Alexander Band v. The Queen* T-3904-78 [Nov. 26, 1990]; *Blueberry River v. Canada* 14 F.T.R. 161 [1988].

[89] Suggestions for a valid objective given by the Court in *Sparrow*, at least with respect to an Aboriginal right to fish in B.C., include the conservation and management of the resource (which of course is essential in the protection of the rights themselves, being dependent on the resource for their continued enjoyment) and the physical protection of the general populace, if it could conceivably be jeopardized in the performance of the right.

> would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for regulation of the fisheries.

These 'other factors' should also be considered in the light of the 'first consideration' of the Court with respect to justifying infringement, namely "the special trust relationship and the responsibility of the government vis-à-vis aboriginals."[90] Soon after its release the *Sparrow* test was being applied liberally to both Aboriginal and Treaty rights in many provincial jurisdictions[91] with this use of the test in a Treaty context being endorsed by the Supreme Court with the release of *R. v. Badger* (1 S.C.R. 771 [1996]) and *R. v. Cote* (3 S.C.R. 139 [1996]).[92] The effect of this wide application of the test diluted the initial restrictions placed on the exercise of government power. This is exemplified in *R. v. Gladstone* (2 S.C.R. 723 [1996]).

In *Gladstone* Lamer C.J.C. looks to *R. v. Van der Peet* for guidance on the purpose of s.35 (1) and what might constitute a valid infringement (para. 72):

> [s.35 is]...first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second , the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory...the import of these purposes is that the objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by aboriginal peoples or – and at the level of justification it is the purpose which may well be most relevant – at the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown.[93]

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[90] One clear message in *Sparrow* is that the application of the 'justified breach' component of the *Sparrow* test is a safety valve, to be used in unusual circumstances and on a case-by-case basis. In fact, the Court in *Sparrow* specifically denounced the concept of a broad 'public interest' being used as a factor in the justification of infringement (para. 72): "The Court of Appeal below held... that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource or in the public interest"...We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."

[91] *R. v. Joseph*, 4 C.N.L.R. 59 (B.C.S.C) [1990]; *R. v. Bombay*, 1 C.N.L.R. 92 (Ont. C.A.) [1993]; *R. v. Jones*, 14 O.R. (3d) 421 (Ont. Prov. Div) [1993]; *R. v. Gladue*, 2 C.N.L.R. 101 (Alta. Q.B.) [1994]; *R. v. Fox*, 3 C.N.L.R. 132 (Ont. C.A.) [1994].

[92] Rotman (1997) argues that because Treaty rights are the result of solemn, mutually negotiated agreements between the Crown and Aboriginal people, those rights should not be altered, abrogated or infringed without the consent of First Nations people. In fact, Treaty rights were negotiated with the Crown for the express purpose of solidifying, clarifying and delineating rather vague Aboriginal rights, doubly protecting those rights by entrenching them in Treaties. Rotman (1997:161) also notes that Aboriginal and Treaty rights were given explicit and individual mention in s.35 of the *Constitution Act, 1982* which would again suggest that the drafters of the constitution realised the important differences in these rights, even if lower courts had chosen to ignore them.

[93] McNeil (1997:37-38) notes the contradiction in the suggestion that any law infringing Aboriginal rights could ever have as its purpose the recognition of the prior occupation of North American Aboriginal peoples.

Under this interpretation, s.35 (1) amounts to a recognition that Aboriginal rights need to be reconciled and 'compelling and substantial' objectives are those that highlight conflicting Aboriginal and Crown interests. Working within this conceptual framework Lamer C.J.C. greatly expands what a "compelling and substantial", justifiable objective might look like (para. 73-75):

> ...distinctive aboriginal societies exist within, and are a part of, a broader social political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable... objectives such as the pursuit of economic and regional fairness, and the recognition of the historic reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.

Whereas in *Sparrow*, justification is a process that allows a reconciliation of two distinct cultural entities to be *achieved* when absolutely necessary (i.e. as a solution to a problem; bringing two together), in *Gladstone* reconciliation is perceived as a *reason for* justification (i.e. as an antidote to 'conflict' within larger Canadian society).[94] These objectives are a far cry from the conservation and public protection objectives pondered in *Sparrow*. Not only are they well outside of a context where at least the constitutional rights of the public are being balanced with the constitutional rights of Aboriginal people; in consideration of their inherently economic components, they closely resemble the 'public interest' justification which the Court in *Sparrow* so clearly disdained.[95]

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[94] In *Delgamuukw v. British Columbia* (1 C.N.L.R. 14 (S.C.C.) [1998] at para. 168) similar examples of justification are given as related to provincial interests. Also, it is important to note that in *Sparrow* the justification relates to sustaining the Aboriginal right in question, given that without conservation the exercise of the right may not be sustained over time.

[95] McNeil (1997:38-39) gives this sobering account of the impact of *Gladstone*: "We need to be clear that what Lamer C.J.C. was referring to here was not reconciliation through agreements negotiated with Aboriginal peoples, but rather reconciliation through unilaterally imposed legislative infringements of their constitutional rights. This sounds more like a continuation of the historical treatment of Aboriginal peoples, whereby, in the words of Dickson C.J.C. and LaForest J. in *Sparrow*, their rights "were often honoured in the breach"[pp.1103], than an approach designed to achieve real reconciliation through mutual respect and negotiated settlements. Moreover, while one can appreciate that the interests of non-Aboriginal groups in the fishery are also involved, the fact is that if those interests are in conflict with Aboriginal fishing rights today, then the historical reliance upon and participation in the fishery by those groups in the past was probably in violation of Aboriginal rights as well. Can reconciliation really be achieved by judicially-authorized perpetuation of past injustices rather by sitting down and working out mutually-acceptable solutions to these conflicts?"

In *Delgamuukw* Lamer C.J. elaborates the second part of the test; namely, whether the infringement is consistent with the fiduciary duty of the Crown. He notes that in *Sparrow* the brunt of the duty could be discharged by giving priority to the Aboriginal right to fish, and in *Gladstone* the duty could be discharged by 'taking those rights into account' in 'a manner respectful' of that priority, and in a way that one could illustrate that those rights were considered (paras. 163-164). However, Lamer C.J. is careful to limit the extent of this correlation by noting that discharging the duty will not always demand that Aboriginal rights be given priority, priority is to be given to Aboriginal rights only if there is an internal limit on the right. In *Sparrow* it was fishing for food or ceremonial purposes. The Court altered the approach to priority in *Gladstone* because there it was a commercial right to fish—no internal limit on the right. Later, the approach is applied in *Delgamuukw* to Aboriginal title. It requires that both the process by which the resource is allocated and the actual allocation reflect the prior interest. For example this might entail that government accommodate participation of Aboriginal people in resource development (para. 167).

Chief Justice Lamer reiterates the central role of the nature of the specific relationship between each First Nation and the Crown in determining the content of the fiduciary duty: "What has become clear is that the requirements of the fiduciary duty are a function of the 'legal and factual context' of each appeal" (para. 162). To expound the ways that the Crown's duty might be discharged within each special context (i.e. outside of the obvious and well understood premise of priority), Lamer C.J. looks to the 'additional' questions suggested in *Sparrow* including "...whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the Aboriginal group in question has been consulted..." (para. 162). Lamer C.J. does not limit his analysis to Aboriginal rights however, but also describes a similar, if not identical, 'tool box' available for the justified infringement of Aboriginal title (paras. 165-169).

The framework proposed in *Delgamuukw* is analogous to a 'duty discharge toolbox'. When rights are sufficiently specific to activate the fiduciary duty of the Crown, the Crown is caught in a situation of balancing and reconciling rights in different legal and factual contexts. It must rifle through the toolbox to find the appropriate tool(s) for the 'job' of discharging its duty. Sometimes the Crown might rely on the 'priority tool', others times it

might employ the 'compensation tool' or the 'consultation tool' to do the job.[96] In any case, the Crown should always remember that the job might be reviewed by the Court so on occasion it might be advisable to use a combination of tools. Likewise, it is a good idea to use only the appropriate tools for the job and to always be cognisant of the ominous judicial jingle "...as little infringement as possible in order to effect the desired result.").[97] Hence, in *Delgamuukw* the Court identifies rights and title that are sufficiently specific to activate the fiduciary duty of the Crown and then proposes a supercharged version of the consultation spectrum discussed in *Haida* as the mechanism by which the Crown may continue to balance its public law duties with its specific fiduciary duties to Aboriginal people. The effect is to push a case where the fiduciary duty is activated up the spectrum into the higher levels, where accommodation of rights and other special considerations and requirements are found.

Most land and resource management activities that occur today occur under the jurisdiction of provincial governments in Canada. However, outside the s. 35 justification test, the *sui generis* Crown-Aboriginal fiduciary relationship in Canada has not been clearly applied to provinces by the Courts. This creates the odd situation where provincial Crowns have the majority of the discretion and power to impact rights and interests of Aboriginal people, but simultaneously have the least clear obligations. For these reasons I now explore how and if the *sui generis* fiduciary duty may also apply to provincial Crowns and what the implications of that application would be in a context of resource development and land management of unoccupied provincial Crown lands.

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[96] Indeed, now and again the Court might throw another tool in the box or the Crown might attempt to fabricate a unique tool to do the 'job' (which of course would be subject to a quality inspection and certification by the courts).

[97] It is important to note that the 'tools' forwarded by the Court in *Delgamuukw* are not themselves the duty of the Crown. The tools are merely manifestations of, and witness to, the underlying duties of the Crown and enable the 'job' of discharging the duty to be done. This is why adding together all these manifestations (or dumping out the toolbox) does not fully describe the scope of the Crown duty in a given context. Also, because Lamer C.J. is clear that the tools are only different ways that 'the duty' can be 'articulated' depending on the context and the nature of the rights at issue (para. 162), this implies that not all tools need to be used in order to satisfy 'the duty' of minimally imfinging rights in reconciliation.

7. Application of the *Sui Generis* Duty to Provincial Crowns

7.1 Early Developments

Confusion pertaining to which Crown holds special duties towards Aboriginal people in Canada is not a new phenomenon. In 1873 the Saulteaux Indians entered into Treaty 3 with the Dominion government, which had the effect of exchanging the Aboriginal title of the Saulteaux for Treaty rights and annuities. With the burden of Aboriginal title on the lands removed, the Dominion government began to issue timber dispositions to an anxious third party—the St. Catherine's Milling and Lumber Company. However, the newly formed Ontario provincial government contested Dominion jurisdiction over the lands, claiming that all resources in the province were vested in the province under section 109 of the *British North America Act, 1867* (*BNA Act*).[98] The Dominion government disputed this suggestion, claiming it would be unreasonable to expect the federal Crown to assume the costs of treating with the Indians if the beneficial interest of the surrendered lands would pass to the provincial Crown. The case proceeded all the way to the Privy Council (*St. Catherine's Milling and Lumber Co. v. The Queen* 14 A.C. 46 (P.C.) [1888]) where the Court determined that under the *BNA Act* 1) the federal Crown held exclusive power to obtain a surrender of Aboriginal lands and to create reserves 2) the provincial Crown gained the proprietary interest and administrative authority of the surrendered lands. The Court in *St. Catherine's* reinforced that Treaty could remove the Indian interest in traditional territories; however, the Court separated the power to enter into Treaties from the power to fulfil the terms of those Treaties once they were completed (Rotman 1996: 224).[99] Although this decision may have provided

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[98] It was the province's perspective that s.109 contemplated unreserved lands and resources under Dominion control at the time of Confederation and also those lands and resources that would come under Dominion control after that time, namely through the surrender of Indian title through Treaty in accordance with the terms of the *Royal Proclamation, 1763*.

[99] The situation became more complicated as early Courts tried to sort out the implications of the decision with respect to surrenders of Indian reserve lands. In *Canada (A.G.) v. Giroux* (53 S.C.R. 172 [1916]) the Supreme Court of Canada proclaimed that the interest in reserve lands did not disappear upon surrender, but rather the interest in the lands would remain in the Indian commissioner of Indian lands on behalf of the Band after the surrender had taken place. The Court recognized an obvious distinction between the Indian interest in traditional territories (Aboriginal title) and the Indian interest in reserve lands. However, this point was overruled by the Privy Council in *Quebec (A.G.) v. Canada (A.G.)* (A.C. 401 (P.C.) [1921], also known as '*Star Chrome Mining*'). In *Star Chrome* the Privy Council applied the logic from *St. Catherine's* to reserve lands, thereby equating the interest in reserves to that of traditional lands. This meant that when a surrender of reserve land took place, the Indian interest essentially 'disappeared'. The Supreme Court decision in *R. v. Guerin* (2 S.C.R. 335 [1984]) was a way to remedy the wrongs of earlier Court decisions by finding a distinct fiduciary obligation owed by the Crown when reserve lands are surrendered (Bartlett 1989).

jurisdictional clarity, the Court said nothing about how the special trust relationship between the Crown and First Nations fit into the new constitutional order of Canada.

In 1982, s35 (1) of the *Constitution Act* recognised and entrenched Aboriginal and Treaty rights. These rights represent integral aspects of a way of life that are essential to the cultural sustainability of Aboriginal people. The *Sparrow* justificatory has been applied to provincial Crowns, who control most of the activities occurring on the lands where rights and traditional uses are practiced. However, this has been done without fully describing what, if any, corresponding provincial fiduciary obligations exist with respect to Aboriginal people or the source of those obligations. The reality is that First Nations, who had originally entered into Treaty with the Dominion Crown, today find themselves utterly dependent upon provincial Crowns to manage lands in a way that ensures their way of life will continue. They rely upon provincial Crowns to maintain the honour of the Crown and fulfil the solemn promise to develop and settle lands in a way that will maintain ecological and cultural sustainability.

Rotman (1994:739-740) suggests most of the confusion stems from the improper or elusive use of the term 'Crown':

> It is insufficient to state...that "the Crown... breached its fiduciary obligations to the Indians" without revealing which personifications of the Crown are bound by those obligations. In a juridical context, the phrase "the Crown" has a multitude of meanings that refer to a variety of personae. It may refer to the historic constitutional notion of a single and indivisible Crown, to a British Crown in its various personalities, or, domestically to a federal Crown, or a particular provincial Crown. What is required, then, is a direct examination of the various elements of the Crown that may be bound by fiduciary duties to First Nations; in particular, the Crown in the right of Canada and the Crown in the right of a province.

Despite the void of any clear, comprehensive description by the Supreme Court of how and if provincial Crowns may share in the fiduciary duties owed to Aboriginal people, some authority does exist which may clarify the application of these duties to provincial Crowns.

Early Privy Council decisions pertaining to the payment of Treaty annuities in *Ontario Mining Company v. Seybold* (3 C.N.L.C. 203 (P.C.) [1902]), *Robinson Treaty Annuities* (A.C. 199 (P.C) [1897]) and *Treaty No. 3 Annuities* (A.C. 637 (P.C.) [1910]) have discussed the provincial obligations concerning the fulfilments of terms of Treaty, though the source of that duty and remedy for its breach remain largely undefined (Bartlett 1990 185-190).[100] More recently, in *Smith v. The Queen* (1 S.C.R. 554 [1983]) Estey J. discussed

[100] For an excellent analysis of these early decisions see Rotman (1994).

implementing promises made to Indians under Treaty (citing a comment made by Street J. of the Divisional Court of Ontario in the *Ontario Mining* decision, para.169):

> The surrender was undoubtedly burdened with the obligation imposed by the treaty to select and lay aside special portions of the tract covered by it for the special use and benefit of the Indians. The Provincial Government could not without plain disregard of justice take advantage of the surrender and refuse to perform the condition attached to it.

In *Ontario (A.G.) v. Bear Island Foundation* (2 S.C.R. 570 [1991]) the Supreme Court discussed whether the Teme-Augama Anishnabai people adhered to the Robinson-Huron Treaty in 1850 and what the effect of that adherence had upon their claimed Aboriginal title. The Supreme Court held that the effect of the Treaty was to extinguish any Aboriginal title, but also that the Crown "breached its fiduciary obligations" to the Indians. The Court concludes by mentioning that the matters involving the breach of duty "currently form the subject of the negotiations between the parties" (pp. 575). Rotman (1996: 241-242) notes that the relevance of these statements is that the negotiating parties were the provincial government and the Temagami people—not the federal government. The logical inference is that the Court held Ontario responsible for the fiduciary obligations owed to the Temagami people.[101]

In *Halfway River First Nation v. British Columbia (Minister of Forests)* (B.C.J. No. 1880 (B.C.C.A.) [1999]) Huddart J.A. of the British Columbia Court of Appeal had no difficulty finding a provincial fiduciary obligation to respect specific Treaty rights to hunt under Treaty 8 (para. 178):

> I share Mr. Justice Finch's view that the District Manager was under a positive obligation to the Halfway River First Nation to recognize and affirm its treaty right to hunt in determining whether to grant Cutting Permit 212 to Canfor. This constitutional obligation required him to interpret the Forest Act and the Forest Practices Code so that he might apply government forest policy with respect for Halfway's rights. Moreover, the District Manager was also required to determine the nature and extent of the treaty right to hunt so as to honour the Crown's fiduciary obligation to the first nation...[citations omitted]

Recently, in both *Wewaykum Indian Band v. Canada* (220 D.L.R (4^{th}) 1, 2002) and *Haida Nation v. British Columbia (Minister of Forests)* (SCJ No. 70 [2004]), the Supreme Court has clearly limited the fiduciary component of the honour of the Crown to cases where there exist discretionary powers over specific rights or interests. In some jurisdictions where rights and interests are in a state of being proven, this means that those potential rights fall under the

[101] For an excellent discussion of this case an the surrounding issues see McNeil (1990) and McNeil (1992).

general protections offered under the broader honour of the Crown as promised in s. 35 of the *Constitution Act,* 1982. However, as discussed above, these decisions may not alter the application of the *sui generis* fiduciary relationship in the Treaty 8 context of Alberta, given that these rights may be sufficiently specific to attract the fiduciary component of the honour of the Crown, at least in terms of where the Crown's actions infringe these specific rights.

7.2 Unified Crown

With the introduction of the *British North America Act, 1867* (30 & 31 Victoria c.3.) Canada became an independent Nation operating under two distinct jurisdictional entities: federal and provincial. The characterization of these distinct jurisdictional bodies as 'federal Crown' and 'provincial Crown' has resulted in this administrative division being interpreted in a way which implies the existence of two distinct Crowns in Canada. Under the new order, the jurisdiction of the federal 'Crown' included the power to legislate with respect to Indians and Indian lands (s.91), while the provincial 'Crown' maintained control of lands and resources (s.92). This jurisdictional separation, combined with unfavourable black letter law in early Court cases, has had the combined effect of reinforcing a separation of the 'Crown' literally responsible to the Indians (federal Crown) from the 'Crown' that has the ability to impact the rights and interests of the Indians through actions on the land (provincial Crown). It has also created divergent perspectives around how this jurisdictional division affected the special trust relationship of the Crown towards the Indians.

In *Gitanyow First Nation v. Canada* (3 C.N.L.R. 89 [1999]), a case which considered whether the B.C. Crown was required to negotiate in good faith in the B.C. Treaty process, Williamson J. considered whether the provincial Crown shared in the fiduciary duties of the Crown towards First Nations people. Williamson J. disagreed with B.C.'s position that the fiduciary duty passed only to the federal government in 1867 (para. 46-47):

> In my view, this position is based upon an unfortunate tendency to speak of "two crowns" in Canada. There is only one Crown. The Crown "is not and never has been divisible"[citations omitted]...In 1867, the powers, duties and responsibilities of the Crown pre-Confederation were enumerated and assigned to either the Crown in Right of Canada and or the Crown in Right of the Provinces. But, as can be seen above, the fiduciary obligation of the Crown which characterized its relationship with Aboriginal peoples continued after 1867 as before. As a result, in its dealings with Native peoples within its jurisdictional powers, the Crown in the Right of British Columbia must act in light of that duty even as its predecessor, the Crown of colonial times, should have done.

If there were only 'one Crown' in Canada, this would imply that provinces are required to use their power and discretion over lands and resources in a way that respects, acknowledges and discharges the duties encumbering those powers.[102] This interpretation is also compatible with the principle of the honour of the Crown. If the Crown were permitted to hide from its duty by delegating power to a different manifestation of itself that did not have the ability (or legal requirement) to perform its obligations to First Nations people—the honour of the Crown would not be upheld (Rotman 1996:238).

The Aboriginal perspective of 'the Crown' should also be considered. Aboriginal people's reference point for the agent who would perform the duties owed to them has always been 'the Crown'—not the Crown in the right of Britain, Canada or Alberta (Rotman 1996: 244-245). It is important to understand that these complex legal constructs were imposed upon Aboriginal people and that they were not consulted regarding the semantic effect or legal consequences of this division. To be sure, in 1867 the concept of transforming 'the Crown' from a single and indivisible entity to a 'separate and divisible' entity was completely external to Aboriginal understandings of 'the Crown' (Rotman 1994:769). Such a construct would go against hundreds of years of economic, political and social interaction with explorers, fur traders, missionaries and official representatives of the political and legal authority of the Crown.[103] Rotman (1996:244-245) also points out that given the fiduciary nature of the relationship, Aboriginal people were not responsible for discovering the changes therein, nor were the nature and extent of the obligations changed in any way because of the supposed changes. This is because it is a general precept of fiduciary law that beneficiaries need not check into the actions of the fiduciary and changes to the obligations under the relationship can only be made by consent of a fully informed beneficiary.

In fact, as late as 1907 there was utter confusion amongst the native population in Alberta as to who had the power and obligation towards them. The following letter from the Stoney Indian chiefs sketches the climate of the times (Letter from the Stoney Indians to Superintendent General of Indian Affairs, 9 April 1907, RG 10, v. 6732, file 420-2):

> As now law has been made by the white chiefs at Edmonton. They tell us that we must not hunt the goat and sheep in the mountains; that we must not kill prairie

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[102] However, unlike British Columbia, which received its power directly from the British North America Act, 1867 (via s.109), Alberta was not a province until 1905 and had its powers over resources transferred under the *Natural Resources Transfer Agreements, 1930* (*NRTA*). One might argue that this unique historical reality would somehow exclude Alberta from the obligations encumbering confederation provinces. However, one must also consider that the very purpose of the *NRTA* was to put the western provinces in exactly the same position as provinces which joined Canada at the time of Confederation.

[103] Indeed, even after 1867 government officials made no effort to change these perceptions as is evidenced in the written dialogue surrounding the numbered Treaty negotiations provided by Morris (1971).

> chickens for all this year, and part of next year, that we must not kill more than one moose, one caribou, one deer; and that we must pay $2.00 before we can hunt. Now when we made a treaty with your chiefs, we understood that there would always be wild animals in the forest and the mountains. But the white men come every year, more and more, and our hunting grounds are covered with the houses and fences of white men...After treaty payment in the fall of every year, when our hay and the feed for our houses and cattle, are all gathered, we like to hunt the deer, the sheep, and the goat that we may eat sweet meat...Look kindly upon us, oh white chiefs. Let us still hunt the game in the fall as our fathers did...We try to keep all the laws, but this is very hard for us. If you cannot let us hunt we will be very poor indeed. We do not believe that this Government at Edmonton wish to be hard on us but we believe that they have not been told the truth about our needs. Listen to us white chiefs and look kindly upon us...We ask you to change this law, that we may be allowed to hunt as our fathers did. Give us freedom to go into the mountains and the forests to look for meat of the wild animals, and the birds, when our children ask us for it. We cannot hear them cry for food, and we are too poor to buy them meat...We shake hands with you. We would like to have some man from our Reserve to talk to the white chiefs at Edmonton, when they make new laws so that they will know what we need and so that they will not make laws that are hard on us...this country was ours and we gave it to the white men for very little, that we might show our friendship. Let the white men help us now, when our own land is not enough to provide food for us.

The Stoneys seem to understand that there were different heads of authority or 'white chiefs' in different locations, but they express confusion as to why that should matter with respect to the promises made to them at the time of Treaty. Rather, the Stoneys seem to regard the various 'white chiefs' not as separate entities, but as different levels of authority in one body who was responsible for instituting the spirit and terms of the Treaty.[104]

Rotman (1996:250) offers the helpful analogy of a pocket watch to describe the unique impact of the administrative division of the Crown on the pre-existing fiduciary requirements of the relationship. Similar to a pocket watch, the fiduciary duty of the Crown is comprised of many parts which, when assembled together correctly, performs a function which cannot be properly carried out by any individual part alone. The changes that have occurred in the constitutional understanding of the Crown since 1867 have resulted in individual components of the duty of the 'Canadian Crown' to be attached to either the federal or provincial Crown in a way which reflects the redistribution of the powers,

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[104] In a powerful dissent in the landmark case *Mitchell v. Peguis Indian Band* (71 D.L.R. (4th) 193 (S.C.C.) [1990]), Chief Justice Dickson held that the phrase 'Her Majesty' referred to both the federal and provincial Crowns in Canada. Dickson C.J.C. found that Aboriginal understandings of the Crown would include the provincial Crown, and any divisions or alterations to that concept were internal to itself and do not change the structure of the Crown-Native relationship in Canada. In any case, it is very unlikely that Aboriginal groups would have agreed to Treaty terms which would see the division of 'the Crown' into one government that would hold obligations to them under Treaty and a separate and entirely different government who would have power over the lands on which those rights depend; yet would have no obligations to them to maintain those rights (Ross and Sharvit 1998:658-659).

responsibilities and benefits under the *BNA Act, 1867*. To determine how the duties of the Canadian Crown towards Aboriginal people are divided among the federal and provincial Crowns is simple: duty follows power. The manifestation of the Crown that has the ability discharge the duty holds the duty.

Today provincial governments have control over resources in their respective jurisdictions. The land-management decisions of these governments have direct and indirect consequences for the way of life of Aboriginal peoples. Under a 'unified Crown' interpretation, this power to impact Aboriginal and Treaty rights would imply that Alberta shares a corresponding duty towards Aboriginal people in the province. Of course, this does not mean that development and settlement cannot occur, even when it conflicts with Aboriginal use. The *sui generis* fiduciary relationship allows for the balancing and reconciling. Under a unified Crown concept, Alberta shares in the solemn understanding between Aboriginal people and the Crown that development and settlement may occur, but in a sustainable way and with every effort being made to protect the integrity and sustainability of Aboriginal culture.[105]

7.3 Inherited Duty

Even if Alberta is a distinct constitutional, jurisdictional and administrative entity wholly separate from the federal Crown, this does not necessarily excuse the province from fiduciary obligations to First Nations people in the province. Alberta may have inherited their obligations by assuming discretionary power over Aboriginal people. However, Alberta would likely deny this on the basis that 1) Alberta does not have the legislative authority to unilaterally abrogate Aboriginal or Treaty rights 2) Alberta does not share in the special obligations recognized under Treaty because it had no option to refuse the terms of Treaty, and that any obligations with respect to Treaty anticipated by constitutional arrangements such as section 12 of the *Natural Resource Transfer Agreements, 1930* (*Constitution Act, 1930*, 20-21 George V, c. 26 (U.K.)) are obligations owed to the federal government, not Aboriginal people.

With respect to the first point, there are several major deficiencies. As already stated, despite s. 91(24) of the *BNA Act, 1867* Alberta retains a unique ability to jeopardize these

[105] Discussed in greater detail in section 3.

rights and lands. Section 88 of the *Indian Act, 1985* also expands provincial powers with respect to the rights held by Aboriginal people:[106]

> Subject to the terms of any treaty and any other Act of the Parliament of Canada all laws of general application from time to time in force in any other province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

Alberta has significant power to impact Aboriginal rights indirectly through the management of Crown lands and resources, such as opening up access to land where traditional uses are employed to non-Aboriginal competition and over-allocating fish and wildlife resources all have impacts on Aboriginal and Treaty rights. Effluent from provincially approved pulp mills and power plants may raise water temperatures and increase levels of pollutants in the water.[107] Alberta holds pervasive power to impact the interests of Aboriginal people in the province, without express legislative authority over Aboriginal lands and rights. If "mutual power entails mutual responsibility" (Rotman, 1994:762) then Alberta may have inherited obligations towards Native people by accepting and exercising those powers.

The second point is equally weak. It must be understood that Treaty is not the sole source of the fiduciary obligations owed by the Crown—Treaty is an acknowledgement of those obligations.[108] Further, Treaty is about power and obligation. Development would come, but the Crown engaged in a solemn promise that development would be balanced fairly with the land based rights and activities on which the cultural sustainability of Aboriginal people depended. As discussed above,[109] a breach of Treaty does not always equate to a breach of fiduciary obligation, nor does it need to. The key aspect of the *sui generis* fiduciary

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[106] In fact, even though s.88 expressly forfeits provincial powers over Aboriginal lands, Bartlett (1990:134) notes that ultimately s.88 grants some powers to lands as well, for example in situations where the provincial authorities must access lands to enforce child welfare laws.

[107] A growing body of evidence is revealing the negative impacts of hydroelectric development on ecosystems (Rosenberg *et. al.* 1987; Schindler 2001). Hydroelectric development has contributed to massive increases in shoreline erosion through lake impoundment, and through the diversion of waters through river channels with insufficient hydraulic capacity to handle elevated flow levels (Rosenberg *et. al.* 1995:127). Reservoir impoundment has also resulted in serious increases in mercury levels in fish, with concentrations in predatory fish reaching almost six times the Canadian marketing limit in some areas (Rosenberg *et. al.* 1995:132). Of special concern is recent evidence indicating that significant elevations of fish mercury concentrations continue for many kilometres *downstream* of reservoirs (Rosenberg *et. al.* 1995:133). For discussion see Statt (2003).

[108] Treaty can give rise to unique obligations, but should also be understood as a reiteration of the *sui generis* fiduciary relationship between the Crown and Aboriginal people, which predated Treaty and is not altered at its core by Treaty.

[109] Section 2.6.

obligation, which is preserved in the provisions for development and settlement, is that rights may be balanced and reconciled but that there are specific expectations and requirements that ensure that reconciliation is performed in a way consistent with the honour of the Crown towards Aboriginal people. In 1930 Alberta gained control of the lands on which Aboriginal and Treaty rights depend. As discussed in detail in the next section, s.12 of the Alberta *NRTA* represents an effort on the part of the federal Crown to ensure that Alberta would fulfil the terms of the solemn promise made under Treaty:

> s.12 In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

Alberta's interpretation of s.12 may be that it represents an obligation to the federal government to ensure that the federal Crown's Treaty commitments to Aboriginal people are kept. However, even if there were no s.12 in the *NRTA*, Alberta would arguably still be bound by the same fiduciary obligations to Aboriginal people with respect to the specific Indian interests of hunting, trapping and fishing because Alberta accepted the lands and resources knowing that the lands were burdened by the terms of Treaty made with the federal Crown.

In *Haida* the Supreme Court was confronted with similar claims by the province of British Columbia with respect to the obligations of consultation and accommodation owed to the Haida people who had unproven Aboriginal title (para. 59):

> ...the Provinces took their interest in land subject to "any Interest other than that of the Province in the same". The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s.35 deprives it of powers it otherwise would have enjoyed.

Similarly, Alberta cannot claim that it doesn't owe obligations to First Nations in the province simply because it is not able to refuse the terms of Treaty. If Treaty rights are sufficiently specific to attract the fiduciary component of the honour of the Crown toward Treaty 8 First Nations, Alberta may share in the requirements of the fiduciary duty. The honour of the Crown and expectation of Aboriginal people would not be upheld if the Crown could simply dawn a federal or provincial 'hat' at its convenience and thereby circumvent the solemn and *sui generis* equitable obligations owed to Aboriginal people. Instead, the Crown

in the right of Alberta and Canada may share obligations towards Aboriginal people that together meet the requirements of the *sui generis* fiduciary relationship.[110] While Alberta inherits obligations with respect to managing lands and resources in such a way as to maintain the cultural sustainability of Native peoples, Canada retains obligations to perform its own duties with respect to areas within its jurisdiction, such as protecting the Aboriginal interest in reserve lands.

7.4 Specific Duty

The honour of the Crown is engaged in the historical relationship between the Crown and Aboriginal people from the assertion of sovereignty to the resolution of claims and the implementation of Treaties (*Haida Nation v. British Columbia (Minister of Forests)*, SCJ No. 70 [2004] at para. 16). As the Supreme Court notes in *Haida*, the honour of the Crown gives rise to different duties in different circumstances (para. 18):

> Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty…the content of the duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake.

Earlier in the thesis, it was shown that for a variety of reasons Treaty 8 sustenance rights to hunt, trap and fish are cognizable rights which would activate the fiduciary component of the honour of the Crown, despite special provision written into the Treaty allowing the Crown to "take up lands" for settlement and development purposes.

One issue is whether the *NRTA* represents an undertaking of discretionary control by Alberta with respect to Indian interests in the province in general and LRRCN in particular. Examinations of negotiations around the NRTA indicate that Alberta vehemently resisted an undertaking to protect Indian interests and had no intention to do so. However, the issue is not the intent to protect but rather to assume discretionary control. As discussed above,[111] intention is also irrelevant in determining whether a specific fiduciary relationship exists. More important is the reasonable expectation of the vulnerable party that the power holder

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[110] Rotman notes (1994:762): "Mutual power entails mutual responsibility and it is this mutual responsibility, founded in part upon the sharing of legislative and executive powers by the federal and provincial Crowns, that underlies the Crown's fiduciary obligations to First Nations. If a provincial Crown obtains exclusive proprietary rights over Indian lands surrendered by Treaty, then it must, by necessity or logical implication, also obtain a portion of the fiduciary duties owed to the Aboriginal signatories to the Treaty."

[111] Section 5.1.

will not use that power in a way which will compromise or jeopardize his or her interests. In other words, undertaking need not be a commitment to act in a positive way towards the interests the beneficiary but rather that the fiduciary will not act in a negative way. In fact, as outlined above, emphasis on undertaking is over-rated given that the Supreme Court has already made it clear that the existence of fiduciary obligations are not dependent upon undertakings, but may arise equally from the parties' conduct. One can argue that such an undertaking exists in the acceptance of regulatory assurances concerning hunting, fishing and trapping in s.12 of the Alberta *NRTA* and in the power to affect rights through occupation of the Crown and justifiable regulation. Further, conduct in the province in exercising powers under the *NRTA* can also give rise to reliance and expectation. The following section reviews archival evidence around negotiations of the *NRTA* and the protection of Indian interests in the province of Alberta, and the implications for identifying a specific fiduciary obligation in the *NRTA*.[112]

Alberta-LRRCN interaction began at the time the provincial government was formed in 1905. At this time, white competition was putting serious pressure on wildlife resources in Alberta. Indians in the North who continued to rely almost entirely on these resources for their subsistence were struggling. Reports documenting disease, starvation and hardship during this time span many years and reflect the plight of the Indians during this time. These hardships had been continuing for some time with the LRRCN, as represented in the following account (Hayter Reed, Asst. Commissioner to the Superintendent General of Indian Affairs, June 30th, 1887):

> I have the honor to inform you that Mr. E.J. Laurence, Principle of the Irene Training school at Vermillion Peace River, has reported that, out of a small band of Indians belonging to Little Red River…twenty five recently starved to death. This information…is said to have been neither confirmed nor denied, and he adds that, we hope the report if true, has been exaggerated. Further information is being asked, which, if received, will be duly transmitted to the Department.

(E.J. Laurence, Principle of Irene Training School to Hayter Reed, Asst. Commissioner of Indian Affairs, September 5, 1887)

> …I am sorry to say those reports have more than been confirmed and that 29 actually perished , being the entire band, save one girl yet in her teens, who acknowledges having when within a short distance of the Hudson Bay Post – shot and eaten her sister…

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[112] Nevertheless, given that the Crown-Aboriginal relationship in Canada in inherently *sui generis*, any requirements on the province will be subject to standards of honourable reconciliation of the fiduciary duties towards Aboriginal people and the duties owed to the broader public.

These hardships continued in northern Alberta after the introduction of the province as well, as illustrated in this report from the area (Report of Royal North West Mounted Police Sergeant R.W. McLeod, Fort Vermillion, September 11, 1908):

> "I am a treaty Indian with wife and nine children, I hunt north west from Trading posts at the end of horse track from Fort Vermillion on Hay River. My family is now at my hunting country, while I am here to try to get Mr. Wilson, H.B.Co. to give me some assistance as I and my family are destitute and have not sufficient clothing. I hardly got any fur last winter for I had to hunt all the time for food, we were starving. Moose are very scarce, I only killed three since last winter. I have not seen any signs of fur for the coming winter... I know all the Indians are in poor condition which will be worse before spring, since fur is scarce we are in very bad shape. I and my family as you see me are in rags...even there is not rabbits, muskrats or partridges our best moose hunters cannot kill enough to feed their families properly, and whole bands from 5 or 6 families are living on berries..."

The result of increasing scarcity and continuing competition with White settlers and fur miners was a large-scale abandonment of responsible use and stewardship by almost all groups competing for remaining wildlife resources in northern Alberta. In turn, this prompted calls for Alberta to enforce provincial game laws against Indians hunting on provincial Crown lands. However, there was utter confusion as to whether it was within the jurisdiction of the province to even apply game laws to Indians (Letter from W.J. Routledge, Supt., Fort Chipewyan, to The Commissioner, R.N.W.M. Police, Regina, June 8, 1908):

> [Re: Section 66, Chapter 81, *Indian Act*] I have the honor to ask you to be good enough to inform the detachment in the Northern portion of Alberta as to whether the notice referred to therein, has been issued in connection with the Provincial Game laws, and to what extent they apply to Indians.

(Letter from J.H. McIllree, Asst. Commissioner R.N.W.M. Police to W.J. Routledge, Supt., Fort Chipewyan, July 3, 1908):

> No notice has been issued in connection with Indians in your command.

(Letter from Sgt. A.H.L. Mellor, Sergeant of Detachment at Fort Chipewyan to Officer Commanding, R.N.W.M. Police N. Division, Athabaska Landing, 31st December, 1912):

> [no notice has been given under s.66 of the *Indian Act*] As no such notice has been issued (as per Assistant Comissioner (*sic*) McIllree's letter) it follows that the Provincial Game Acts <u>do not</u> apply to Indians. On the other hand, the Attorney General of Alberta states in a letter on the subject, that the Alberta Game Act <u>applies</u> to Indians in exactly the same manner as to others, and that infractions of this Act must be treated as such...As Beaver are protected by the Alberta Game Act until the 31st December 1912, and it has come to my notice that many Indians have been killing beaver right along, I have therefore seized eight beaver skins so far, all killed of the Indians...After consultation with the local Justice of the Peace...I finally

decided however, to lay information against the Chief of the Chipewyan Band, Alexander Laviolette, simply as a test case, and I beg to report that he was this day fined the sum of $1.00 on the above charge (the fine of course is simply a nominal one). I may say that the Indians are very angry about the whole business, as they claim that at the time they took treaty they were distinctly informed by the Treaty Commissioners that they would not be interfered with in any way regarding their killing food or fur animals, and the beaver is of course used for both…After a lengthy and somewhat heated discussion with the Indians , the Chief finally was amenable to reason and paid the fine…to a certain extent the Indians are not quite wrong…It is, as you will readily observe, most important that this difficulty should be cleared up one way or the other as soon as possible. I have had a lot of trouble over the case and am most reluctant to be again placed in such an ambiguous position…

(Letter from T.A. Wroughton, Supt. Commanding N. Division, Athabaska Landing to the Commissioner, R.N.W.M. Police, February 6th, 1913):

…Section 66 of the *Indian Act* would imply unless the Superintendent General of Indian Affairs declares that the Game Laws shall apply in any of the Provinces and North-West Territories or any portion of them, Indians would be exempt from the working of the several Game Ordinance and Regulations. Will you kindly obtain for our guidance a ruling on this matter.

(Letter from A. Bowen Perry, Commissioner at Regina to Deputy Attorney General, Province of Alberta at Edmonton, February 12, 1913):

I have the honor to report that there has arisen a question as to the standing of the Indians, North of Parallel 55, with regard to the Game Laws of Alberta. [mentions s.66 of *Indian Act*] …This would imply that unless such a notice were issued the Indians would not be subject to the provisions of the Game Laws. A prosecution has taken place at Fort Chipewyan against an Indian for killing beaver contrary to the provisions of the Alberta Game Laws, and a fine imposed. The Indians are reported to be very angry at this and claim that they were informed at the time of their taking treaty, by the commissioners, that they would not be interfered with in regards to killing food for fur or animals. I would be glad if you would give me your opinion regarding this, in order that I may issue instructions to our men in the North.

(Letter from F.T. Clarry, Deputy Attorney General, Alberta at Edmonton to A. Bowen Perry, Commissioner at Regina, April 8th, 1913):

…I am of the opinion that the Alberta Game Act is in Force in the Northern part of this Province at the present time…I notice your reference to Section 66 of the Indian Act, which provides that the Superintendent General may by public notice declare that certain provisions of the Alberta Game Act may apply to Indians in this Province. I would draw your attention, however, to the case of The King v. Stony Joe, which came up by way of a stated case…in October 1910. The effect of this decision is that the Alberta Game Act is in force against Indians of this Province unless the Dominion Parliament has legislated with respect to the same matter. So far as I can find, no such legislation or Proclamation has been made; hence the Alberta Game Act is in force in the district in question…

In fact, in the unreported decision of *R. v. Stoney Joe* (1910) Justice Charles Stuart of the Alberta Supreme Court held that the Stoney Indians at Morley agency were subject to the 1893 game ordinance of the North-West Territories rather than the *Alberta Game Act*. In his decision however, the learned judge did note that in areas where the Dominion had not passed regulations under section 66 that Indians would be subject to provincially-created game laws of general application.[113] Alberta then proceeded to request that the Superintendent General unilaterally apply provincial game laws to all Indians in Alberta; however, the Deputy Superintendent of Indian Affairs, Frank Pedley, refused (Irwin 2000:59).[114]

By the summer of 1914 members of the Royal North West Mounted Police were forcefully searching Indian homes for moose meat that might have been taken in contravention of provincial game laws (PAC, RG 18, v.468, file N/A, c. 1914). When Indian agents protested these actions, the Department of Indian Affairs reinforced the application of game laws and informed Indians that they were under provincial game laws. Simultaneously however, the Department did attempt to press for leniency in the application of game laws to Indians in the exact same way as any other person (Letter from Duncan C. Scott, Deputy Superintendent General of Indian Affairs to Lawrence Fortescue, Royal North West Mounted Police, September 4, 1914):

> I have to say that that Department has consistently advised the Indians that they lay themselves open to the penalties set forth in these laws by any violations of the provisions of the same. They have also been informed that it is clearly in their own interests that these laws shall be obeyed...At the same time the Department has always contended that the Indians, as being the original owners of the soil, are entitled to special privileges and considerations and should not have the laws applied to them in certain instances as rigidly as in the case of the whites.

Jurisdictional confusion continued to plague the political relationship between the province and the dominion and the nature and extent of Alberta's ability to apply provincial game laws to the detriment of Indians remained vague. However, over time there emerged a recognition

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[113] In 1912 *Alberta Game Act* (S.A. 1911-12, c.4, sec. 25(4)) even expressly required that Indians purchase licences for subsistence hunting and also provided for unrestricted hunting for food by all residents (Indian or non-Indian) north of 55 degrees latitude.

[114] Interestingly, as early as 1890 Sir John Thompson recommended the disallowance of a game ordinance of the Legislative Assembly of the North-West Territories, citing (Report of Sir John Thompson, 1890 cited in letter from Department of Justice Canada to N.W.M. Police, August 27, 1913): "The undersigned does not consider it necessary to discuss the propriety of these regulations, or whether the Indians should be exempt from the regulations. It is sufficient to observe that the utmost care must be taken, on the part of Excellency's government, to see that none of the Treaty rights of the Indians are infringed without their concurrence...the undersigned desires also to observe that it may be doubtful whether the North-west assembly has authority to legislate in respect of hunting and fishing upon the public domain of Canada...the undersigned respectfully recommends that the Ordinance in question is disallowed."

that something needed to be done to rectify the situation. In the ensuing discussions between Alberta and the federal government I suggest that three key principles emerge:

1. The climate in northern Alberta was not conducive to agriculture and the Indians would continue to require the traditional vocations of hunting, trapping and fishing to meet their subsistence needs.
2. Indian rights under Treaty to hunt, trap and fish and carry on their lives as formerly on unoccupied Crown lands had to be maintained so as to:
    a. ensure that promises under Treaty were met
    b. ensure that the Indians would not become a financial burden upon the dominion government
3. The importance of entrenching the application of provincial game laws to Indians for the purposes of conservation and the preservation of wildlife resources.

One early strategy proposed to balance the interests of Indian subsistence with white competition and development was to create special harvesting reserves where exclusive Indian hunting, trapping and fishing could occur. This strategy would remove white competition, thereby allowing Indians to return to responsible management of the areas for their own use. In theory, this would also achieve all of the above-mentioned goals because it would both protect and ensure that the rights of northern Indians and would preclude the need for provincial game laws to be applied, given the reduction in competition and corresponding increase in available resources (Memo from Colonel O.M. Biggar to Duncan C. Scott, Deputy Superintendent General, Department of Indian Affairs, January 30th 1925):

> The situation in regard to game is difficult. In southern Alberta the Indians have become agriculturalists and have ceased to depend for their livelihood on hunting, but this is by no means the case in the north, where many bands depend upon trapping and fishing for a livelihood...The Department of Indian Affairs is just as much, or even more concerned to secure the preservation of game than the provincial authorities themselves. In the old days the Indians themselves took care to conserve and protect the game so as to yield them their livelihood as readily as possible, and they were in effect the only trappers. Now, however, the commercial trappers destroy the beaver house and take the pups. This sort of thing, though against the law, is impossible effectively to prevent and the result is the gradual disappearance of the game and probably some alteration in the attitude of the Indians themselves, who, finding their own efforts to conserve the game fruitless, are inclined to be less careful.

However, relief through harvesting reserves for the exclusive use and enjoyment of Indian people was delayed because on the 28th June, 1914 World War I began with the assassination of Archduke Ferdinand. The War did not end until 1918.

In the early 1920s the idea of the special exclusive reserves re-emerged. As an added benefit, it appears that the Indians themselves preferred this strategy (Letter from G. Card, Indian Agent to Assistant Deputy Minister of Indian Affairs, August 15, 1922):

> All were very indignant at the way White trappers were crowding them out of their hunting and trapping grounds...There has been trouble for several years among both the Cree and the Chipewyan Bands, [in] Fort Chipewyan, about the game restrictions imposed by the provincial government, and by the ever increasing number of White trappers who have come into the country. In one case a white trapper named Bjarson is claimed to have threatened a number of Indians, and practically, for the time being, driven a number of families from their trapping and hunting grounds and from their homes...the fur will soon be wiped out and the Indians will be direct charges on the government, as other than hunting and trapping there is no work for them. To protect their interests, as guaranteed by treaty, both bands asked for reserve, not for farming, as they had not wish to farm, nor is the land suited for that purpose, but for hunting and trapping. The area is much larger than that which they are entitled by treaty, but the bulk of the land is water and marsh ground...

In 1923-1925 there was serious discussion and deliberation internal to the Department of Indian Affairs in terms of how to implement this strategy of the hunting reserves for Indians (Letter from G. Card, Indian Agent, Fort Smith Agency to Assistant Deputy and Secretary, Department of Indian Affairs, May 4, 1923):

> At the conclusion of the annuity payments, last summer, the Cree and the Chipewyan Bands, Fort Chipewyan, made application, in the form of a memorial, asking for the survey of a reserve in the delta of the Athabaska and Peace Rivers. An area much larger than that which their present population would entitle them to by treaty. But as formerly stated the land is non-agricultural. Consisting of small lakes, sloughs and swamp land and some timber. The above tribes stated that they were not farmers and had no intention of farming. I would respectfully suggest that the treaty paying officer, this season, whoever he may be, should be in a position to give an official answer as to what consideration their application for a reserve has received.

(Letter from Gerald Card, Indian Agent to Indian Agent Mclean, August 19, 1924):

> The Chief and headmen were anxious to know what action the government had taken for the setting apart of a hunting and trapping preserve, claiming that their condition was getting more pitiable every year. They asked for the matter to be again placed before the government...The Chief, headmen and members of the band held a long council, regarding the much discussed Hunting and Trapping Preserve...The Cree and the Chipewyan Bands again brought up the urgency of having a Hunting and Trapping Preserve set aside. Apart from interested White trappers, their unanimous wish has the support of local public opinion. They, the Indians, claim that their condition is becoming more pitiable every year, and that unless prompt action is taken, it will be too late.

Some evidence also exists that contemporary discussion had occurred with the Alberta Minister for Agriculture George Hoadley (Memo to file, 27 October, 1926, PAC, RG10, Volume 6732, File 420-2B).

Simultaneous to these developments were talks between the federal government and Alberta regarding the transfer of lands and resources to the province, which were also delayed due to the First World War. By 1925 Alberta and Canada had reached a tentative deal for the transfer of resources to the province. However, there was initial concern to protect Indian interests from the province with the understanding that the province would have some discretionary control over specific Indian interests such as hunting, fishing and trapping promised under the Treaties. In recognition that the transfer would have far reaching consequences, some of them irreversible, the Minster of the Interior requested that he be briefed on all Indian interests that could potentially be affected by the proposed transfer (Letter from the Office of the Deputy Minister of the Interior to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, January 16th, 1925):

> ...some consideration should be given to the needs of the Indians. Could you let me have a statement showing just what the Government is committed to in the matter providing lands for Indians and what provisions should be made to take care of this in the event of the transfer of the Natural Resources.

(Letter from Duncan C. Scott, Deputy Superintendent General of Indian Affairs to the Surveys Branch, January 17, 1925):

> Will you please let me know what the provisions of the various treaties, covering the province of Alberta, are with reference to the allotment of Indian reserve lands, and whether the Indians of this province have been given their full quota of land under the treaties...Kindly let me know whether there are any special timber reserves or any temporary additions to reserves.

(Letter from Donald Robertson, Chief Surveyor of the Surveys Branch to Deputy Minister Department of Indian Affairs, January 19, 1925):

> [description of pending reserves to be set aside totalling 368 square miles]
>
> ... a portion of the Wood Buffalo Park extends into the Province of Alberta and hunting privileges were secured for the Indians of that district in this park. The Indians of Fort Chipewyan have also requested that an area South of Fort Chipewyan be converted into a park in which the Indians only would have hunting privileges.

(Memo from Deputy Superintendent General of Indian Affairs Duncan C. Scott to Department of the Interior regarding the transfer of lands to the province of Alberta, January 29, 1925):

> [Reserves, Administration and Sale of Indian Reserves, Timber and Resources, Road and Trails are all outlined in the memo, as is Indian Hunting and Fishing concerns]

Hunting and Fishing

> While the Indians shall be subject to the game laws of the Province, provision should be made for hunting and fishing reserves, and for exemptions in favour of Indians who are hunting and fishing purely for their own sustenance.

(Memorandum from Williams to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, February 6th, 1925):

> [reference to protection of hunting rights and privileges]
>
> It seems to me that these matters should be dealt with in the proposed legislation and not left to be worked out in the future with the Province of Alberta or to be determined by the court of law. The Dominion is in a better position than it will ever be hereafter to assert what it conceives to be rights and interests of the Indians and to secure consideration of these interests from the Provincial Authorities…I am disposed to think accordingly that it would be quite regular and advisable that a provision should be inserted in the proposed act providing for special privileges of hunting and fishing for the Indians located in that part of the Province where they have to depend for their livelihood upon hunting and fishing.

Through this documentation it is apparent that in 1925-1926, the Department of Indian Affairs was aware that they had a unique opportunity to leverage the concept of exclusive harvesting reserves for Indians with the transfer of resources and lands to Alberta. However, no effort was made to include the special reserves in the negotiation of the transfer of lands. It is not entirely clear in the archival record why the federal government did not expressly burden the transfer of lands with the hunting reserve concept, though there is evidence that it may have been due to internal conflict (Memo from Colonel O.M. Biggar Chief Electoral Officer to Duncan C. Scott, Deputy Superintendent General, Department of Indian Affairs, 30 January 1925):

> My present view is that it is not only not necessary but would be dangerous to suggest that inclusion in an agreement with Alberta of provisions on any other subject but this, and that any term of the agreement on this subject should be limited to continuing to the Indians the same rights in unoccupied Crown lands after their transfer to the Province as they now enjoy in respect of them.

Rather than special harvesting reserves, the following section was proposed as a measure to protect Indian subsistence rights (Draft of Alberta Agreement sent to D.C. Scott, May-June 1925):[115]

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[115] It is interesting to note that the terminology which the Supreme Court in *Badger* later used to discredit arguments for Indian commercial rights, namely "the right to hunt, trap and fish for food on all unoccupied Crown lands" is missing from s.9. Instead, this earlier proposal seems more broad, recognizing the Treaty rights of the Indians.

> s.9 To all Indians who may be entitled the benefit of any treaty between the Crown and any band or bands of Indians, whereby such Indians surrendered to the Crown any lands now included within the boundaries of the Province, the Province hereby assures the right to hunt and fish on all unoccupied Crown lands administered by the Province hereunder as fully and freely as such Indians might have been permitted to so hunt and fish if the said lands had continued to be administered by the Government of Canada.

For a variety of reasons, the 1926 agreement died on the table. With no protections in place to affirm rights and clarify the application of game laws, hardship continued for the Indians in the province and the concept of hunting reserves was again a topic of negotiation between the province and the federal government (PAC, RG10, Volume 6732, File 420-2B). There is even specific reference to a harvesting reserve for the Little Red River Cree Nation.[116] However, it seems that serious negotiation was slowed due to a fundamental difference in interpretation of how the reserves would operate. Whereas the Department of Indian Affairs and Alberta both seem to realize the necessity and advantage of creating reserves for exclusive Indian use, Alberta sought to restrict Indian hunting and trapping to the reserves. Alberta wanted to open other areas of the province only to white hunters and trappers. White hunters and trappers voted in provincial elections and they paid licensing fees to the province for their trap lines (Irwin 2000:62). Ultimately, the province was accountable to them.[117]

The Department of Indian affairs was not comfortable with Alberta's position, as is represented by a note to the file contemporary with these developments (Memo to file, 27 October 1926):

> It is obvious that if the Indians are to confine their trapping activities to the areas set aside for their exclusive use, they will in effect be waiving their treaty right to trap anywhere in the province. It is assumed that any such waiver can only be made by

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[116] (Report from Harold Laird, Acting Indian Agent, "Proposed Hunting and Trapping Reserves for the Indians of the Lesser Slave Lake Agency, Alberta, these reserves include their present hunting grounds" April 5, 1927): [Chart attached outlines hunting reserves for]: Group 1-Sucker Creek, Driftpile, Swan River and Sawridge; Group 2-Wabasca, Whitefish Lake and Grouard; Group 3-Outside Agency; Group 4-Little Red River, Tall Cree, Boyer River; Group 5-Outside Agency; Group 6-Slaves of Upper Hay River; Group 7-Moberly Lake, Hudson's Hope and Fort St. John.

[117] (Letter from Benjamin Lawton, Game Commissioner, Game Protection Branch, Alberta Department of Agriculture to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, October 28, 1927): "It would appear to me that before anything definite can be decided on that some changes and reductions in the areas should be made. I note particularly in the case of the selections made by Mr. Laird that whole settlements are included. It must be borne in mind that there are many of the homesteaders in the North Country whose interests must be protected. It is possible that we would be in a better position to form an opinion as to how large the areas should be if we knew how many Indians there are who would carry on trapping operations in the different sections specified by Messr. Laird and Card. I would also be pleased to know as to whether special regulations will be necessary for controlling these trapping grounds and as to whether the Indians would be confined to such areas or allowed to wander over other areas for the purpose of hunting and trapping."

> the Indians themselves, and the attitude which they might take towards any such proposition has not been discussed with the Indian Department.

The Indians were not amenable to being confined to reserves and soon rumours were being spread amongst northern Indians that if they agreed to reserves of any kind that they would be made to stay within their borders (Letter from Chief Laviolette to Bishop Breyant, July 15, 1928):

> ...the said information being that if the Indians at Jackfish Lake were given a reserve they would be compelled to live within the boundaries of the reserve, and would also be forced to make a livelihood by following an agricultural pursuit...It is not the wish of any of the tribe to become farmers, chiefly because they have no arable land to farm...but they are quite willing and able to become muskrat farmers...Each family of Indians belonging to the Jackfish Lake band should be allotted from three to four hundred acres of muskrat sloughs...these individual muskrat ranches should be included within the boundaries of the Indian reserve that has been promised them by the Department. This would insure greater protection for them, as it would then be impossible for the white trappers to trespass on the ratting ground as they are doing today...

It would appear that as a result of confusion and disagreement around the operation of the harvesting reserves, the Department of Indian Affairs made the transfer of lands conditional on meaningful protection and recognition of the subsistence rights of Indians and clarification of the application of provincial game laws with respect to Indians (Letter from Duncan C. Scott to J. Chisholm, Acting Deputy Minister of Justice September 4, 1929):

> I may say that with the development of the country and the entry of outside hunters and trappers into the northern regions of the Province where the Indians rely almost entirely upon game for their subsistence, their plight is becoming more desperate year by year with the disappearance of game and while, as I stated, I think the Indians in these regions have the full rights granted by treaties it is a question in my mind as to whether it would not be advisable to have it now set forth in this agreement that the Indians in these northern regions shall have the right to take game at times for their subsistence, and I should like to discuss this matter with you before the agreement is finally completed.

The agreement eventually reached was subsequently reflected in s.12 of the Alberta *NRTA*, 1930:

> s.12 In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

Following the transfer of lands and resources to Alberta, confusion about the meaning of s.12 abounded. The *NRTA* did not expressly define what was meant by "game" and "unoccupied Crown lands" in the Act and everyone had an interpretation. Some even suggested that s.12 removed the Indians from provincial game laws entirely (Letter from C.F. Newell, Edmonton Fish and Game Association to Honourable George Hoadly, Minster of the Agriculture, February 22, 1930):

> I would be very glad if I conclude that Section 12 of the Act does not extend the right to the Indians of hunting and fishing, but with the information I have on hand I cannot come to this conclusion…I would be very glad if my construction of Section 12 is incorrect, but it seems to me the only construction that can be placed upon this section is that it will take away from the Province by statute, (which will be confirmed by the Parliament of Canada and the Imperial Parliament), any right to regulate the hunting and fishing by Indians on unoccupied Crown lands…As to hunting, does not this give the Indians the right to hunt on all unoccupied Crown lands, and also other lands, such as timber reserves, provincial parks, sanctuaries, and game preserves, if these are owned by the Province, for simply setting these aside as such purposes, it seems to me, would not make them occupied Crown lands?

The idea of harvesting reserves also continued to be discussed, although it is seems that much of serious discussion on how to implement the idea was internal to the federal government. By 1934, discussions resume with respect to a harvesting reserve in the Northwest portion of the Province. Indians in this area were apparently struggling due to the mandatory registration of trap lines in their traditional trapping areas. The proposal for a large reserve in the Northwest of the Province would extend into the Northwest Territories and British Columbia and would be for the exclusive use of Treaty Indians from both Alberta and British Columbia. This meant that jurisdictional issues would have to be overcome and that the subsistence areas/use of the Indians would need to be determined in order to justify the cause.[118]

Despite renewed discussion of hunting reserves in the mid 1930s, the hunting reserve concept was never implemented in Alberta. The exact reasons why are unclear in my research and review of the archival material. It may be a combination of increased white

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[118] Further information can be obtained through the following sources: (Indian Affairs, September 12th, 1934: Letter from N.P L'Heureax, Indian Agent at Driftpile to Dr. H.W. McCill, Deputy Superintendent General); (Letter from F. Mackenzie, Secretary of Indian Affairs to M. Christianson, Inspector of Indian Agencies, September 22, 1934); (Letter from F. Mackenzie, Secretary of Indian Affairs to C.C. Perry, Assistant Indian Commissioner (Victoria, B.C.), October 6, 1934); (Letter from MacInnes, Acting Secretary to Roy Gibson, Acting Deputy Minister of the Department of the Interior, October 27, 1934—PAC, RG 10, volume 6733, file 420-2x); (Letter from J. Lorne Turner, Department of the Interior (Lands, North West Territories and Yukon Branch to R.A. Gibson, November 2, 1934—PAC, RG 10, volume 6733, file 420-2x); (Letter from Roy Gibson Assistant Deputy Minister, Department of the Interior to Dr. Harold McGill, Superintendent General of Indian Affairs, November 9, 1934); (Letter from Harold McGill, Superintendent General of Indian Affairs to Roy Gibson Assistant Deputy Minister, November 12, 1934).

settlement in the proposed areas, the consideration of and provision for Metis rights and lands, increased pressure from fish and game associations and other groups, disagreement around the nature and operation of the reserves and possibly even jurisdictional challenges. It may also be that the province simply felt that Indian rights and uses of the lands would be adequately protected through the inclusion of s.12 in the *NRTA, 1930*. In any case, it is largely irrelevant for the purposes of this paper why this did not occur. Rather, what is of interest here is how the actions of the province during this time (1905-1935) frame the unique relationship between the province and LRRCN.[119]

Alberta participated in discussions around setting aside exclusive hunting reserves for use of Northern Indians, to some extent, from the early 1920s to the mid 1930s. Alberta's actions illustrate that it had no intention whatsoever in undertaking to act in the best interest of the Indians of the Province. However, Alberta actively worked to assume greater jurisdiction and control over Indian harvesting rights by encouraging the application of provincial law to Indian use of the land and harvesting (even passing legislation in 1912 which required Indians to pay Alberta for licenses to perform rights promised to them in Treaty). Alberta did consider creating special harvesting reserves, but simply to free up other areas for exclusive White use (limiting Indian use to the reserves).

Regardless of the motives of Alberta in considering the reserves, three things are apparent from Alberta's actions during this period:

1. Alberta wanted to reduce resource conflict on Crown lands.
2. Alberta wanted to entrench its power to regulate Indian use of resources, at least for conservation purposes.
3. Alberta recognized that a certain minimum amount of unoccupied Crown land that was unaffected by White competition, settlement or development would be required for Indians to carry on their way of life (or to ensure that they could subsist on these reserves and not compete with whites off the reserves).

Later, once Alberta realized that Indians' use would not be limited only to the reserves, it seems the Province opted to negotiate sections in the 1926 and then the 1930 *NRTA* agreements that would guarantee Indian rights in all unoccupied Crown lands with the right of the Province to regulate for conservation purposes. Through the transfer of lands and

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[119] LRRCN is currently pursuing a specific claim which suggests that the transfer of lands to the province was burdened with the interests recognized by the province and the federal government in the discussions surrounding the establishment of the reserves, and therefore Alberta is obligated to establish the reserves. The argument also suggests that these recognized interests would qualify as interests in the land that would grant LRRCN (and other northern groups) 'occupant status' under the *Alberta Public Lands Act* (R.S.A. 2000, c. P-40). Because of the sensitive nature of this pending claim, I will not address these arguments here.

resources in s. 12 of the *NRTA, 1930* Alberta acquired discretionary power over cognizable Indian interests through land ownership and legislative power.

Further s.12 of the *NRTA* should be considered in the context of the negotiation from which it originally was born. The section was an alternate strategy to accomplish the aforementioned goals of Alberta. The section reduced uncertainty around application of game laws entrenching the power of the province to regulate certain Indian interests for conservation purposes (the first two goals). The province also recognized that Indian rights would require a certain amount of unoccupied Crown lands (unaffected by White competition, settlement or development) in order for northern Indians to carry on their life as formerly. If s.12 is interpreted this way, then the *NRTA* can also be viewed as an understanding to manage unoccupied Crown lands in a way that accommodates the performance of an Indian way of life. In other words, the province could take up lands from time to time, but enough unoccupied Crown lands would remain free of white competition, development and use to ensure that the Aboriginal way of life would remain tenable.

In this sense, s.12 might be considered a commitment more broadly to assume the role of the Crown to balance and reconcile certain Indian rights with those of larger society. Alberta would receive the rights to take up land from time to time, but the province also had a corresponding commitment that the taking of lands (i.e. management of the lands) would be balanced with the way of life of Indian people. As described above, recent case law has created a justificatory framework that is to be used in the balancing and reconciling of rights. Alberta has been allowed to justify its actions using this framework (i.e. *Sparrow* test in *Badger*), and a pivotal aspect of the justificatory framework is consultation.

Arguably, even if s.12 does not represent a commitment by Alberta to balance interests and to accommodate Indian use of unoccupied Crown lands, the province could be bound to do this as part of a separate and distinct fiduciary relationship with (at least) northern Indians in the northern part of the province. Although the province clearly had no intention to engage in a fiduciary relationship with northern Indians, as outlined above, the core attributes required for the establishment of a fiduciary relationship are 1) undertaking of discretionary control and 2) reasonable expectation. Motive and intention are largely irrelevant in the formation, maintenance and conclusion of a fiduciary relationship (*Huff v. Price* (76 D.L.R. (4th) 138 (B.C.C.A.) [1990]) at 171; *M(K) v. M(H)* (96 D.L.R. (4th) 289 (S.C.C.) [1992]) at 324). The fact is, even before the transfer of resources to the province Alberta was actively pursuing greater control over Indian rights. Later, with the transfer of resources, Alberta inherited tremendous power over lands in the province: the power that had

originally been solemnly transferred to dominion by Treaty with the Indians. With increased provincial power and a greater ability to impact the rights of northern Indians, the Indians would also have been under a corresponding reasonable expectation that the province would consider their interests in management decisions in such a way as to provide for a continuance of those rights. The result is a clear undertaking of discretionary control by the province and a reasonable expectation on behalf of northern Indians. All the ingredients for the birth of a separate and distinct fiduciary relationship on the province are present.

8. Discussion: Answering the Research Questions

8.1 The First Research Question

***1)* Does the Cooperative Management Planning process, established under the LRRCN-Alberta Memorandum of Understanding (MOU), satisfy the Crown duty to consult LRRCN in relation to Crown decisions which have the potential to infringe on Aboriginal and Treaty rights and interests?**

In order to answer this question, one must 1) define what the obligations of Alberta are to Aboriginal people in the province in land management decisions that may infringe Aboriginal and Treaty rights and then 2) determine if cooperative management satisfies those obligations. Earlier I suggested that First Nation consultation is governed by way of a three-stage process. The first stage applies to those cases where there are potential rights that have minimal evidence supporting them. The second stage applies to those claims where a strong *prima facie* case exists, and there is a credible, but unproven, claim. The third stage applies to those cases where there are established rights or title of First Nations, such as claims which have been recognized by a Court or negotiated directly with the Crown through Treaty or agreement. I will now use this three-stage process as an instrument to determine whether cooperative management is an effective vehicle for discharging the duty to consult. For the purposes of analysis, I will consider the application of these precepts within the hypothetical context that the cooperative management planning process is the only process being used to consult the First Nations. There are likely many claims of LRRCN that would fall within stage one and two of the spectrum, but to extrapolate the nature and content of those potential claims and to consider the suitability of cooperative management for each of those claims is beyond the scope of this research. Instead, I will group the stages involving potential claims (stages one and two) together for the purposes of focusing the analysis. I will then concentrate most of my discussion on stage three, where I have suggested Treaty 8 subsistence rights are located, and where all the precepts and principles of consultation and accommodation apply and are perhaps "supercharged" by the fiduciary component of the honour of the Crown.

8.2 Stages One and Two on the Consultation Spectrum: Potential Rights

Stage one and two on the consultation spectrum involve potential rights. The primary focus of this research is to determine if the cooperative management process is an appropriate mechanism to discharge Crown duties for consultation and accommodation of established rights. It is beyond the scope of this research to delineate all the potential claims of the LRRCN and then apply the cooperative management structure to those potential claims. However, certain aspects of the cooperative planning process can be highlighted which illustrate that it facilitates consultation with respect to potential rights.

At the level of the LRRCN Cooperative Management Planning Board ("the Board"), First Nations representatives are able to share their land use patterns, subsistence requirements and their perspective of the nature, scope and extent of their rights. In fact, the Board is the perfect vehicle for communicating this information because it occurs directly between the First Nations, the Crown and other stakeholders. In other settings, where a First Nation is given opportunity to share these ideas or assert their rights directly with the Crown (i.e., in a government to government setting, perhaps at a negotiating table), the Crown may be reluctant to, in turn, share that information with Industry or other resource users for fear of legitimizing potential claims. At the Board level, measuring the effects of the development on potential rights and interests becomes more manageable because their scope and nature are known. Concerns can be anticipated in the development of the project proposal and measures to minimize impacts can be worked into the plans that will be set before the First Nation, thereby reducing the impact on claims in the short and longer term, allowing time for those claims to be pursued. This is especially important where a potential claim is far from recognition yet the potential impact on the claim is high (perhaps in the case of a sacred site of high cultural value).

The cooperative planning process allows information about potential claims to be shared, and project plans to be altered. This way, the interests of all parties may be met. Once individual claims are identified, the specific stage one or two duties can be dispatched at the Board level accordingly. As discussed above, the principles of consultation for potential claims (stage one and two) form the foundation of consultation requirements further up the spectrum (stage three). Therefore, the application of the cooperative management planning process established under the MOU to these foundational principles could be easily severed from my analysis of stage three below. As a result, I will now consider the

requirements of stage three on the consultation spectrum and whether they can be discharged under the cooperative management planning process.

8.3 Stage Three on the Consultation Spectrum

Above I have argued that the fiduciary component of the honour of the Crown may be activated in a Treaty 8 context, "supercharging" the consultation spectrum outlined in *Haida*, and that Alberta shares in the requirements of this fiduciary duty. In addition, I argued that Alberta might have unique obligations to LRRCN (and other northern Indian groups) under the *NRTA*, which may be summarized as a commitment to manage unoccupied Crown lands in a way that would accommodate the performance of an Indian way of life. I have also argued the Crown's duty is *sui generis* because the interests of larger Canadian society have to be balanced with those of Aboriginal people. Given this, I suggest the obligation of the Alberta Crown to LRRCN may be best described as follows:

> To balance and reconcile the specific rights of LRRCN with those of other Albertans in resource management and land use planning decisions while maintaining the integrity and sustainability of LRRCN culture and way of life to the greatest extent possible.

Because Courts have forwarded a justificatory framework for the Crown for use in situations which require balancing and reconciling of rights and consultation is central to that framework, the question really becomes whether cooperative management is an adequate vehicle to achieve the requirements of the justificatory process, in particular the pivotal duty to consult. It is clear, given the Treaty 8 context and fiduciary nature of the relationship, the principles of stage three should be used to analyse the cooperative management framework. Stage three applies to those cases where there are established rights or title of First Nations, such as claims which have been recognized by a Court or negotiated directly with the Crown through Treaty or agreement. Consultation in these cases is triggered when "the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (*Haida Nation v. British Columbia (Minister of Forests,* SCJ No. 70 [2004] at para. 35).

The general role of the Board established under the LRRCN-Alberta Memorandum of Understanding (MOU), is described as follows:

1. to undertake a "Landscape Assessment" related to management and use of renewable natural resources including:

a. Environmental aspects related to eco-system integrity, biodiversity and landscape patterns and structure;
b. The presence of endangered, threatened or rare species of flora and fauna;
c. Economic aspects related to resource values, current resource uses, potential future resource uses, development costs and opportunity costs associated with the prescribed resource uses;
d. Social aspects related to the value of renewable natural resources from a First Nation perspective; and
e. Integration of ecological, economic and social aspects related to planning and management responsibilities within the SMA;

2. to develop, as a recommendation to the Ministers a "Resource Management Philosophy and Goal Statement", intended to guide the management and use of renewable natural resources within the SMA. This statement will:
   a. recommend resource-use priorities which are compatible with sustainable development and traditional use of the SMA by LRRCN/TCFN;
   b. recommend objectives and guidelines for management and use of renewable natural resources;
   c. identify economic development, employment and training opportunities and initiatives for LRRCN/TCFN within the SMA; and
   d. identify special initiatives to address First Nation concerns regarding management of wildlife and wildlife habitat within the SMA.
   e. Development of renewable resource mechanism or processes which are required to implement this integrated resource management process;
   f. Development of administrative or contractual relationships which are required for implementation; and
   g. Amendments to regulations, policies or laws which are required for implementation.

To ensure different views are considered in the management process, the Board is composed of representatives from Alberta, LRRCN, TCFN, the municipal district, and several forest companies (including those owned by the First Nations).[120] In this way, it can operate as a mechanism to facilitate consultation on the potential impact of government actions on rights and interests in the reconciliation of Crown duties to the public and the duties owed to LRRCN people.

It is clear that LRRCN and TCFN perceive the cooperative management process as a valid mechanism for consultation with their respective nations (LRRCN 2000d:4-5):

> The MOU between the LRRCN/TCFN and the Government of Alberta establishes a cooperative management planning process and provides a mandate to the Board, created under the MOU, to undertake an integrated resource management planning process. This MOU constitutes a formal consultation process between Alberta

[120] The composition of the Board is discussed in greater detail in section 3.

> Environmental Protection, Alberta Resource Development, Alberta Aboriginal Relations and two First Nations (i.e. the Little Red River Cree Nation and the Tallcree First Nation). The MOU process is consistent with the Government of Alberta policy provisions for consultation with Aboriginal peoples, including the Alberta Aboriginal Policy Framework.

The question is whether the Board satisfies Alberta's duty to consult LRRCN in relation to Crown conduct that might adversely affect LRRCN Treaty rights and interests. One way to measure the efficiency of consultation processes is to apply the principles and precepts of consultation outlined in section 4.4 of this thesis.

(1) "The Crown and First Nations must consult in good faith"

The MOUs do not explicitly bind the members on the Board to act in good faith. Nor do they deal with information or activities that prevent parties from acting in good faith. In fact, there is good reason to assume that, regardless of what the MOU says, members are required to act in good faith.

Whenever the Crown knows it is consulting with First Nations (regardless of the stage or process of consultation) it must act in good faith (*Delgamuukw v. B.C.*, 3 S.C.R. 1010 [1997]; *Nunavik Inuit v. Canada (Minister of Canadian Heritage)*, 4 C.N.L.R. 68 [1998]; *Mikisew Cree First Nations v. Canada (Minister of Canadian Heritage)*, F.C.J. No. 1877 [2001]; *Haida Nation v. British Columbia (Minister of Forests)*, SCJ No. 70 [2004]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, SCJ No. 69 [2004]). Alberta has also publicly acknowledged its duty to consult in good faith in *Strengthening Relationships: The Government of Alberta's Aboriginal Policy Framework* (pp.18). This document states under the heading "Consultation" that when regulatory and development activities may infringe rights, the "Government of Alberta, Aboriginal communities and industry have a duty to facilitate dialogue and participate in good faith".

The MOU could be modified to clearly express that the Board's function is to fulfil consultation requirements incumbent on the Crown in regards to resource management and land use activities that have the potential to infringe rights. Because the Board is empowered by the MOU to determine its own practices, procedures and processes using by-laws and operating procedures (Appendix 2, pp. 5) the Board can also mandate that representatives negotiate and share information in good faith. Regardless, if intended as a consultation mechanism it is likely that the good faith mechanism applies.

(2) "The procedural safeguards of natural justice will apply to consultation"

In *Haida Nation v. British Columbia (Minister of Forests)* (SCJ No. 70 [2004] at para. 41), the Supreme Court states "[i]n discharging the duty [to consult], regard may be had to the procedural safeguards of natural justice mandated by administrative law". Black's Law Dictionary (2004) defines natural justice[121] this way:

> The doctrine of natural justice is founded in the notion that logical reasoning may allow the determination of just, or fair, processes in legal proceedings. According to Roman law certain basic legal principles are required by nature, or so obvious that they should be applied universally without needing to be enacted into law by a legislator...Natural justice includes the notion of procedural fairness and may incorporate the following guidelines:
>
> - A person accused of crime, or at risk of some form of loss, should be given adequate notice about the proceedings (including any charges).
> - A person making a decision should declare any personal interest they may have in the proceedings.
> - A person who makes a decision should be unbiased and act in good faith.
> - Proceedings should be conducted so they are fair to all parties – the legal maxim "*audi alteram partem*" comes into play here, as one must "hear the other side".
> - Each party to a proceeding is entitled to ask questions and contradict the evidence of the opposing party.
> - A decision-maker should take into account relevant considerations and extenuating circumstances.
> - Justice should be seen to be done. If the community is satisfied that justice has been done, they will continue to place their faith in the courts.

The concept of "reasonableness" also forms an important part of justification according to Justice Cory in *R. v. Nikal* (1 S.C.R. 1013 [1996] at para. 110):[122]

> It can, I think, properly be inferred that the concept of reasonableness forms an integral part of the *Sparrow* test for justification. So too in the aspects of information and consultation the concept of reasonableness must come into play. For example, a request for consultation cannot simply be denied. So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement.

The cooperative management planning process under the MOUs is a mutually agreed upon process whereby important decisions of the Minister are advised by the Board and (where

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[121] It is important to note that perceptions of "natural justice" are not necessarily universal, nor are they entirely "natural". Rather, this construct is itself a manifestation of Roman law, which has permeated Judeo-Christian understandings of equity, justice and fairness. Although beyond the focus of this thesis, a more comprehensive analysis of Aboriginal legal systems, and practical approaches toward legal pluralism would be a valuable contribution to this subject.

[122] In *Haida*, the Supreme Court also applies the standard of reasonableness to administrative review (para. 60-63).

appropriate) recommendations are incorporated into land and resource management planning in the Special Management Area. It is obvious given the important function of the Board for all parties, that the procedural safeguards of natural justice would be adhered to in the operation of this body.

(3) "The 'quality' of consultation is generally more important that the 'quantity' of consultation and in most instances consultation will amount to more than mere notification"

This principle has emerged in the case law in response to poor information sharing practices around proposed projects. Sometimes project proponents and/or governments have mailed or faxed huge volumes of complex scientific data pertaining to their proposed project to Band offices, overwhelming the limited capacity on reserve to process such information. Detailed reports of possible environmental impacts, wildlife evaluations, seismic activities, topographic maps and charts describing timelines and project costs can also accompany these reports. Similarly, multiple phone calls, emails and faxes and letters may also accompany the information (or in following up on the information). The temptation is for project proponents to use these attempts at communication as a quantitative measure for how well a First Nation was consulted (i.e. 'we sent 13 faxes, made 10 phone calls, drove to the Band office twice and forwarded 4 reminder emails, therefore we have done all that we reasonably can'). These things together can lead to 'consultation fatigue' on the part of First Nations, with First Nations being left to decipher the information and try to comment on it within short timeframes, or miss providing input into the project.

It would seem that this principle is met in the LRRCN MOU process. Communication on the Board is direct with decisions being made by consensus. It would be unproductive for a member of the Board to overload the rest of the Board with complex information around development in the SMA without adequately explaining that information, because those are the same people that will in turn consider the merit of the plan. This is especially true with respect to the First Nations members on the Board, because where the Board is deadlocked, decisions must be made by a majority of the First Nations members on the Board. Also, because Board members are jointly accountable for decisions, there would be less incentive to push through a poorly discussed plan that may have serious consequences for the sustainability of the SMA. Mere notification of a plan would be rare, as other Board members around the table will have ample opportunity to ask questions, actively discuss alternatives, seek changes to the plan or challenge its validity. Overall then, it would seem that the LRRCN MOU meets the purpose of this principle of consultation as well.

(4) "The Crown must fully inform itself of the possible effects of its proposed actions and this should include input from First Nations"

The purpose behind this principle is to ensure that due diligence is carried out with respect to proposed projects or activities in areas where the rights and interests of First Nations exist. If the Crown were not required to ensure that all possible effects are considered in the evaluation of an activity, there would exist little incentive to adequately investigate the impact of a project. Where the full impact of a project is known, it may be more apparent that a project infringes the rights of a First Nation.[123] The temptation for the project proponent (and for the government decision maker or regulator) would be to devote minimal resources to the investigation of possible impacts, which in turn may paint a more optimistic picture of the proposal than would be true if adequate resources and time had been devoted to the investigation phase.[124]

This principle also requires consideration of First Nation concerns regarding the effects of the project. This is essential because First Nation uses of the land may not be fully known. Developers cannot simply obtain a map from the regulatory body or research literature to gauge First Nations use. When First Nation perspectives of the effects of a project are solicited, it gives First Nations an opportunity to share information about how they use the land and how changes in the landscape will affect their way of life. It also gives First Nations the opportunity to share other aspects of their traditional knowledge such as migratory patterns, water level changes and wildlife cycles, that might be affected by the development.

The Board established under the LRRCN MOU may represent an appropriate mechanism for meeting this requirement, at least with respect to major projects. It is within the mandate of the Board to consider effects of proposed actions of the Crown. Point One and Two of the mandate of the Board also discuss the production of a landscape assessment and Integrated Resource Management (IRM). This is significant because if the Board is able to produce a concrete example of how an IRM and landscape assessment might operate in a resource management context, the Board may also represent a forum for meaningful discussion of cumulative effects of all development in the SMA. The Board essentially

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[123] Or that the scope of the area that may be impacted by injurious effects of a development is much greater, perhaps infringing the rights of additional First Nations outside the immediate project area.

[124] This is an important principle, because oftentimes very large scale developments occur in remote areas of Crown land where First Nation rights and traditional uses are intensively employed but where the immediate interests of the general public are less impacted. Simultaneously, the proposed project may be of great advantage to the general public through employment opportunities or resource revenue (e.g. a hydro-electric development or strip mining operation in the north).

becomes a roundtable for discussion of development in the SMA. A bigger picture of development can then be considered with the combined effect of that development being measured. Armed with this broader perspective, the Board can in turn make recommendations on how to minimize and reduce the cumulative impacts of development.[125] Where additional expertise is required, elders, hunters or other persons with the appropriate knowledge of the spiritual, cultural and subsistence uses of the land can be brought in as required. The Board can also share these uses and knowledge with all members and stakeholders simultaneously, eliminating the need for each industry or stakeholder to speak with the First Nations separately. This may have the corresponding effect of reducing redundancy and expense in the consultation process on a project and reducing the occurrence of 'consultation fatigue' on the part of the First Nations. Overall then, it is apparent that the LRRCN MOU process may adequately meet the requirements of this principle of consultation.

(5) "Input from First Nations must be received with the intentions of substantially addressing concerns and a willingness to make changes based on information shared by First Nations"

Based on the case law (*Delgamuukw v. B.C.*, 3 S.C.R. 1010 [1997]; *Halfway River First Nation v. British Columbia (Minister of Forests)*, B.C.J. No. 1880 (B.C.C.A.) [1999]; *Nunavik Inuit v. Canada (Minister of Canadian Heritage)*, 4 C.N.L.R. 68 [1998]), it would appear that this principle was induced to prevent project proponents receiving First Nation input as part of the process but then simply shelving it or adding to the file with no apparent effort to incorporate or address the ideas and concerns presented. First Nations rights, despite their constitutional status, are often downplayed or ignored as legitimate uses of the land. Communities are often without the capacity, readily accessible monetary resources, knowledge or power to assert their rights on the land adequately. The temptation is for a project proponent to discount the concerns and ideas that are shared by a First Nation, focussing on the concerns of other interests in the project area or on the tremendous opportunities that the project will bring. This principle demands a certain level of accountability for the sensitive information shared by a First Nation. Those ideas should be used to inform or alter a project plan, and where they can't be used, a project proponent should be able to show why that is the case.

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[125] For example, in terms of reducing the amount of access required for each industry.

At the Board level, First Nations have the unique opportunity to share ideas and concerns about a development plan, witness how those concerns are addressed, and then use their vote to determine if the amended project should go ahead. Also, because the process is consensus based with a majority vote by First Nations required to break a deadlock, it would appear that First Nations have the forum and the power to assert their rights. However, in cases where a Board recommendation is refused by the Minister things become more difficult. The LRRCN MOU is ultimately advisory and there does not appear to be any requirement on the part of the Minister to report back to the Board on why and how their input was considered or incorporated into the final decision. It is assumed that these cases would be rare, but nonetheless represent a challenge to the LRRCN MOU. This is especially true of situations where the Board recommendation to the Minister was centred on issues and concerns brought by the First Nation members on the Board.

(6) "Consultation does not equate to consent for First Nations, except in certain circumstances such as when the very existence of the rights might be jeopardized by proposed actions and the Crown is not generally under a duty to reach agreement"

The reason for this principle is simple: it prevents First Nations from abusing the consultation process to their benefit. The whole purpose of consultation is to contribute to the balance and reconciliation of the rights and interests of all parties in a larger justificatory scheme. The core concept is that development and settlement may come (conflict will emerge) but these activities would happen in a sustainable way and with due consideration and accommodation of Indian interests. If a First Nation's consent was required to go ahead with a project, the tenability of this balancing structure would be jeopardized and the very sovereignty of the Crown in Canada would be challenged.[126] The ability of First Nation members to break a deadlock on the Board could be interpreted to be a consent requirement in some circumstances. However, the Board itself is ultimately advisory and Board decisions are not binding on the Minister. In that sense (at least in circumstances where the Crown is using the Board to consult First Nations) the consent powers implied at the Board level are removed.

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[126]That being said, the Courts have recognised that in some circumstances First Nation consent may be required, such as when the very existence of a right is challenged by the proposed activity. For example, if a proposed oil sands or strip mining operation were to span the entire traditional territory of a First Nation, or if the only lake where fishing rights are practiced were to be drained, First Nation consent may be required. The application of consent in the context of accommodation of First Nation rights in Treaty 8 will discussed later in this section.

(7) "Adequate time to meaningfully consult First Nations must be allotted and rigid regulatory or legislative timelines may not excuse the Crown from this requirement"

The reason for this principle is to ensure that the Crown does not impose unrealistic timelines on First Nations consultation. Regulatory and legislative timelines in resource management are designed to commit all parties to an expeditious application, review and approval process. They may also operate as a performance measure for government, ensuring that the Crown is facilitating the efficient allocation of public resources, the development of which ultimately leads to increased employment opportunities, revenue and the investment of capital in the province.[127] The problem is that consultation has to fit somewhere into these processes and it can consume significant time and resources. Also, the amount of time needed for consultation may vary from case-to-case, project-to-project and First Nation to First Nation. It is therefore difficult to simply allot a certain length of time that should be devoted or legislate a new minimum or maximum amount of time that consultation should consume. When pressure mounts to move forward with an activity or plan, the temptation is to mould First Nations consultation to the established timelines rather than modify timelines to accommodate First Nations consultation.

Applying this maxim to the LRRCN cooperative management process is cumbersome. On one hand, the Board as an entity is mandated to perform certain tasks which are set before it (e.g., creating the Detailed Forest Management Plan in the 1995 MOU) and these tasks may have corresponding agreed-upon timelines to which First Nations, as part of the process, would be bound. On the other hand, it is clear that the implementation of the cooperative management planning process and the ongoing management of the SMA requires significant consideration of the Board on a variety of individual actions which may potentially infringe the rights of First Nations and thereby trigger stage three consultation. Arguably, activities or circumstances that trigger stage three consultation should not be limited by timelines which bind the Board more generally.[128] One possible remedy to this

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[127] Ministries may also commit to specific turnaround times in their business plans and are accountable when those deadlines are not met. For example, in 2003-2004 the Ministry of Alberta Sustainable Resource Development reported an average turnaround time for an industrial disposition was 20 days with a business plan goal of 15 days (Alberta Sustainable Resource Development Annual Report (2003-2004):41).

[128] That being said, it could also be argued that because the First Nations opted into the cooperative management planning process as a mechanism for discharging Crown consultative duties, they also opted into the restrictions of that process, including timelines that might be required.

problem is for the Board to consider projects before the statutory decision maker approves them. Legislative and regulatory timelines are triggered once a project proponent submits a project for review. The operation of the Board as a planning instrument is also compatible with this alteration, given that most planning occurs before projects are submitted for approval.

An additional challenge would exist if the Board is the only mechanism relied upon as the forum for consultation between the Crown or individual proponents of activities in the SMA. In this case, if the First Nations representatives are absent from a Board meeting, the opportunity to talk about the plan is temporarily delayed and the timelines for a proposed project may be affected. Over time, government or Industry representatives on the Board may become frustrated or lose faith in the cooperative management process as a vehicle for First Nations consultation. Also, if the First Nation Board members require additional specific information from elders in the community or other expertise, or need express permissions from Chief and Council of the Band to proceed (e.g., a Band Council Resolution), that information would have to be sought and then brought back to the Board at the next meeting or perhaps an additional Board meeting would be called. Additional meetings or delays might increase the time or financial costs that other members, not necessarily involved in the issue between the First Nations and the proponent, must invest in the process.[129]

(8) "First Nations cannot frustrate the consultation process, and must express their concerns and interests once they have had enough time to review information"

This principle is also aimed at preventing First Nations from abusing process to their advantage. Just as regulatory and legislative timelines cannot be used to abbreviate the consultative process, First Nations timelines and agendas cannot be employed to frustrate the process. Otherwise, the temptation for First Nations would be to use the consultation requirement as leverage for other considerations or to draw attention to negotiations occurring at different tables. The result might be a case where consultation is being used as a bargaining chip.[130] Another side to this principle is that First Nation concerns and ideas

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[129] On the other hand, the LRRCN MOUs (Appendix 1, pp. 6 at (g), also Appendix 2, page 5 at 3.5) do recognise that from time to time experts or other advisors may be brought into the process as a non-voting member. In this case, if it were known to the First Nation that specialized knowledge or permission would be required, it is possible that the individuals required could be brought into a meeting as required.

[130] For example, a First Nation slowing down consultation around a hydroelectric development so as to secure additional financial or employment considerations or to draw more attention to a land claim negotiation proceeding at a different table.

should be reasonable, with some degree of attainability. So, for example, a typical response should not be one which simply states 'no' or 'okay if we can have 75% of the total revenue drawn from the project'. Once a First Nation has been given the information in a manageable format, with potential impacts being outlined and adequate time being granted to review the information, the First Nation must respond with reasonable concerns and ideas, which the proponent can then use to modify the project so as to avoid, mitigate or minimize the infringement on First Nation interests.

As members of a Board that is jointly accountable for the sustainable management of the SMA, LRRCN and TCFN must be committed to the success of the resource and land management planning process. Also, because timber tenure is awarded to First Nation development corporations which rely on the direction provided by the Board and the efficiency of the process to fulfil their obligations, First Nations have a vested interest in the accuracy, timeliness and adequacy of the information provided in that setting. Even aside from economic incentives, it is to the advantage of the First Nations to foster responsible development of the SMA because essential cultural activities and subsistence activities continue on the landscape and those are jeopardized through poor planning.

That being said, if the First Nations on the Board desired to flex their representative muscle (First Nations corporations and representatives hold a majority of the seats on the Board under the 1996 MOU), they could slow or even stall a proposed project or plan. They could also press for greater financial, employment or other considerations for proposed developments in the SMA. To be sure, in most cases, such a situation would not emerge; however, it is noteworthy that First Nations could manipulate the existing structure and process of the Board in such a way as to breach this principle.

(9) "First Nations may be entitled to a separate consultation process than that of the public or other stakeholders"

The reason behind this principle is to ensure that First Nations with specific rights and interests are not grouped into large 'public consultation' processes when a project is proposed. Public consultation processes can bring a variety of interests from the recreational to the environmental. However, most of these interests will not have constitutional, legislated or policy recognition. Although the Crown may be required to consult with stakeholders as a matter of good government or public duty, there are strong arguments that the Alberta Crown is under a legal obligation to consult with First Nations. Public or stakeholder consultation mechanisms are designed as an information sharing or dissemination tool and the process is

ultimately geared at telling stakeholders how the government plans to balance competing rights within the public body. Although in section 4.4 it was shown that the Supreme Court in *Taku* has endorsed public consultation processes under legislation regarding potential rights and title, it has not clearly endorsed those mechanisms to areas of proven, specific Indian interests such as the Treaty 8 area of northern Alberta. Arguably, Treaty 8 First Nations are entitled to a separate consultative process, one in which the Crown has unique obligations in the provision of information to First Nations as well as the utilization of the information received back.

The cooperative management planning Board established under the LRRCN MOUs does not meet the requirements of a separate and unique process for consultation purposes. The Board is designed to share information equally between members rather than exclusively between the Crown or project proponent and each individual First Nation affected.[131] In fact, the LRRCN MOUs openly encourage the attendance of other interests to the table from time to time, and recognise that public consultation is 'vital' to the process (e.g. Appendix 1, page 5 at 3.5):

> Alberta and the First Nations agree that this cooperative planning process must include full opportunity for public consultation and the inclusion of multi-stakeholder input. Accordingly, the Board, in consultation with its participating industrial, First Nation and government organizations, will:
>
> (a) identify and implement a process for stakeholders to interact with the Board;
>
> (b) establish mechanisms for public review and comment; and
>
> (c) consult with, or second experts as necessary to assist the Board.

The involvement of other interests in the process may maximize resources or reduce time required to move a plan forward, and in most cases those representatives would not be given voting privileges. However, intentionally involving a whole cross section of interests in the planning process does have the corresponding effect of diluting the government-to-government nature of consultation. The Crown is arguably under a constitutional obligation to consult with First Nations—it is not under a similar obligation to consult with industry interests or other stakeholders. The opinions, concerns and ideas of the First Nations should carry additional weight over these other interests, and this should be obvious in the structure and process of the Board. Also, it is clear in the MOU that each party is expected that it will finance and empower its own representatives to participate in the process. As Honda-McNeil

[131] Indeed, aside from the express commitment to allow a majority First Nations vote break a deadlock in decision making, the egalitarian approach of the Board may shroud the priority interests of the First Nations.

notes (2000:97), it is only reasonable that if the province wishes to use the MOU process as a vehicle for consultation, that it should pay the costs absorbed by the First Nations in the process.[132]

Nevertheless, because this principle mainly exists to protect the sanctity of the process that First Nations are entitled to, if First Nations are interested in the cooperative planning process as a venue for consultation they could opt out of the requirements of this principle for the purposes of opting into the cooperative management process. Further, if First Nations agree to this process, equity may not let them reverse their decision and then request a separate process if their conduct is reasonably relied upon by the other participants on the Board. It may be preferable to clarify in the MOU that both the Crown and First Nations agree that the separate process is not required. In any case, as it stands, the planning process in the MOU may not meet the requirements for a separate consultative process and therefore First Nations could have the basis for a claim against the government that adequate legal consultation did not occur in the planning and development of the SMA.

(10) "The Crown must provide full information to a First Nation whose rights may be potentially infringed by Crown actions, and this information may need to be more detailed than standard information provided to other stakeholders"

This principle is related to other principles that speak to the nature of the information required. First Nations consultation is fundamentally different than regular consultative processes because First Nations are asked for their input on proposed developments often before the project proponent even applies for the development permit. The post-consultation development plans should reflect a meaningful incorporation of First Nations input, with projects that inadequately consult First Nations being refused or delayed until such a time as proper consultation takes place. In fact, even where proper consultation does take place with a First Nation, it does not mean that the project will be approved—not all infringements of the Crown are justifiable.

Given that the fiduciary component of the honour of the Crown may be activated in a Treaty 8 context, the information shared with First Nations in this area may look markedly different than that shared with other stakeholders. Fiduciaries are under an obligation to fully disclose to their beneficiary all actions pertaining to the relationship. The duty of full disclosure ensures transparency in the actions of fiduciaries and, when adhered to, it is a

[132] The provision of timber tenure is a major economic contribution, however, and an incentive for the First Nations to become and remain involved in the process. Nevertheless, if the province were to pay for the involvement of the First Nations and no other party, this could create conflict or tension at the Board level.

mechanism beneficial to both parties. Beneficiaries can observe their interests being cared for and fiduciaries are reassured knowing that full disclosure and consent may release them from liability in the event that there are damages to the beneficiaries interests. Any action that goes unreported may be called into question and may undergo intense judicial review. In fact, failure to fully disclose can result in breach even where the beneficiary has not sustained damages. A fiduciary also cannot claim that the information was irrelevant or that he/she did not know the value of disclosing it to the beneficiary.

Of course, given the *sui generis* nature of the Crown-Aboriginal relationship, the equitable duty of full disclosure would likely be tempered with a certain degree of "reasonableness". Yet, as a minimum, information shared with First Nations in consultation should outline the benefits of the project but should also clearly outline the short, medium and long-term impacts of the project in detail. Alternative strategies should also be outlined. If these efforts were not made, a First Nation would have to be an expert in everything, or hire experts, in order to understand a project and make comments. As a matter of good faith the Crown may also need to provide First Nations with the financial assistance necessary to procure the professional assistance necessary to review the proposed action. Once fully informed of the risks and the benefits, First Nations can apply their local knowledge of the environment and their use of the land to help reduce the impact on those things.[133]

The application of this principle to the Board is positive. As previously mentioned, the Board is composed of a variety of representatives from a number of prevalent industry interests in the SMA, the Crown and First Nations. This creates a unique situation where representation from the proponent, the First Nation and the regulator may all be sitting around the same table discussing the same project, *before* the application for the project is put forward. This is significant because in a normal consultation situation the Crown does not see the project until it comes up for review as an application for development. At that point the Crown might have its own concerns and changes, and if those are substantive, the whole

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[133] A useful analogy might be a heart surgeon explaining several different alternative methodologies to perform a surgery, informing a patient of potential side effects of each, and then providing the patient time to decide what strategy they prefer and time to formulate additional questions for the surgeon about the operation. If the surgeon just says 'we are going to do open heart surgery on such and such a day, let us know what you think by next week' it leaves the patient with a lot of unnecessary concerns, questions and fears. Involving the patient in the decision increases the patient's understanding of the operation (why necessary, etc.), allows the patient to feel that he/she was part of the decision and therefore are jointly accountable for the results of the operation, and allows the patient to offer suggestions that the surgeon may take into consideration (want to delay until after I retire next year, have a reaction to penicillin, etc.).

plan may have to go back to the First Nation for further consultation and review. With all interests represented at the Board, redundancy or delay in the planning can be eliminated.

Also, because multiple industry interests are represented at the table, the Board may represent an excellent environment to facilitate discussion around access management (e.g. using one access road for multiple developments, rather than each development proposing its own access road). There is also substantial expertise amongst the representatives that can be shared with the rest of the Board and a corporate memory shared by the Board around previous development plans. Where there is an apparent deficit of expertise, the MOU provides that from time to time experts can be brought in to inform Board decisions (e.g. Appendix 1 at (g)(iii); 1999:5 at 3.5). It is submitted that for these reasons the Board established under the LRRCN MOU is an ideal vehicle for the performance of this principle.

(11) "The Crown is ultimately responsible for initiating the consultative process"

The reason for this principle is to reflect the fact that ultimately all development on unoccupied Crown land, where the constitutionally protected Treaty and Aboriginal rights of First Nations people exist, occurs with the permission of the Crown. The Crown is accountable to the pubic for the timely and efficient management of Crown lands, but may also be accountable to First Nations by way of Treaty and the *Royal Proclamation, 1763* to ensure that development occurs in a sustainable way and that potential impacts on rights can be justified. That said, this may not require the Crown iteself to initiate or conduct consultation with First Nations in every circumstance. The appropriate Minister could delegate these duties through policy, law, or agreement; although, the Crown is still responsible to ensure that they are adequately performed. Certain checks and balances could be put in place. For example, this may mean that the Crown outline guidelines or create policy that requires industry to consult and outlines clear procedures for consultation. A related question is whether consultation procedures must be clearly set out in statutes or regulations or if a policy document is sufficient. In *R. v. Adams* (3 S.C.R. 101 [1996]) the Court addressed this question.

In *Adams*, a Mohawk Indian was convicting of fishing without a license contrary to s. 4(1) of the Quebec Fishery Regulation. The regulation provided special licences for Indian food fishing, however the accused never applied for one, arguing that he was exercising an Aboriginal right to fish and that the provincial laws did not apply to him. After successfully establishing that there was an Aboriginal right to fish and that that right had never been

surrendered or extinguished, the Court considered whether the provincial regulation to obtain a license was of any force and effect. The conclusion of the Court was that s.4(1) of the *Fishery Regulations* was not justified and was therefore of no force and effect. The Court also made some general statements about the mechanisms necessary to regulate the discretion of the Crown in situations where the constitutional rights of Aboriginal people may be infringed (at paras. 54-55):

> In a normal setting under the *Canadian Charter of Rights and Freedoms*, where a statute confers a broad, unstructured administrative discretion which may be exercised in a manner which encroaches upon a constitutional right, the court should not find that the delegated discretion infringes the *Charter* and then proceed to a consideration of the potential justifications of the infringement under s.1. Rather, the proper judicial course is to find that the discretion must subsequently be exercised in a manner that accommodates the guarantees of the Charter [references omitted]...I am of the view that the same approach should not be adopted in identifying infringements under s. 35(1) of the *Constitution Act, 1982*. In light of the Crown's unique fiduciary obligations towards Aboriginal peoples, Parliament may not simply adopt an unstructured discretionary regime which risks infringing Aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an Aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion that seek to accommodate the existence of Aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfill their fiduciary duties, and the statute will be found to represent an infringement of Aboriginal rights under the *Sparrow* test.

Hence, the Court in *Adams* seems to suggest that an inappropriate structure or the absence of a process in which to structure the exercise of discretion by the Crown over the constitutional rights of Aboriginal people may itself be an infringement those rights. The Court further suggests that the structure should be statutory/regulatory in nature. However, the decision in *Apsassin et al v. BC Oil and Gas et. al.* (No. 92 BCSC [2004]) clarifies this matter.

In *Apsassin* the Chief of the Saulteau First Nations applied for a judicial review to quash a decision made by the B.C. Oil and Gas Commission which allowed an energy company to construct an exploratory well site in the traditional lands of the Saulteau. The Commission and the First Nations mutually recognized an area termed the 'Saulteau First Nations Consultation Area' with certain high priority areas within that larger consultation area. Interestingly, the Saulteau had negotiated a Memorandum of Understanding with the province of British Columbia relating to consultation in respect of oil and gas development and the Commission had consulted the First Nation regarding development in the area before and after the application. Commission staff also provided comments and concerns to the decision maker that came out of the consultation process. The central issue in the case was

how the Treaty rights of the First Nation were to be considered and accommodated in the decision making process of the Commission in relation to the application by the energy company. The Saulteau relied on *Adams*, suggesting that the *Oil and Gas Commission Act* was unconstitutional because it gave the commission the discretion to infringe Aboriginal and Treaty rights, and that unstructured administrative discretion automatically infringed their rights.

The Court dismissed the argument of the Saulteau. Although the Commission had significant discretion by way of a number of statutes to oversee the development of provincially owned oil and gas resources, the Court suggested that there was nothing in *Adams* which suggested that the existence of administrative discretion was in and of itself an infringement. Instead, the Court held that the claim that the Commission had 'unstructured discretion' had to be evaluated in the broader context of the legislative scheme. It was apparent that the broader scheme did provide a framework for the establishment of the Commission, the structure and function of the Commission, as well as a set of unifying principles to harness the discretion of the Commission in a variety of contexts.

The Court noted that one of the very purposes of the Commission was clearly set out in the legislation, being to "encourage the participation of First Nations and Aboriginal persons in processes affecting them" and that the *Oil and Gas Commission Act* was "intended to respect Aboriginal and Treaty rights in a manner consistent with s.35 of the *Constitution*" (paras. 164 and 165, respectively). The Court also specifically noted that the 'Consultation Agreement' (established under the MOU) was an adequate vehicle for consulting with the First Nations (paras. 166-167):

> The Consultation Agreement provides for the SFN to review and have input into pre-tenure planning, general development plans, and every application for oil and gas activity on Crown land within the SFN consultation area. The "Purpose" section of the Consultation Agreement states:
>
> > 1.2 This Agreement will set out a process for the Province to communicate with or consult with the SFN in respect of the stages of oil and gas development outlined in section 2.0 on Crown Lands located in the Treaty 8 area of Northeastern British Columbia, so as to provide the SFN with an opportunity to identify concerns or issues the SFN may have in respect of those oil and gas activities, with the intent of avoiding or mitigating any potential infringements of the treaty rights of the SFN.

Overall then, the message that the Court in *Apsassin* seems to be sending in its interpretation of the case in light of *Adams* is that administrative discretion over Aboriginal and Treaty

rights is not itself an infringement when that discretion is properly structured within an overall legislative and policy context.[134]

The application of the above reasoning to the LRRCN MOU context generally, and this principle specifically, is readily apparent. The cooperative management planning process may represent a valid tool for Crown consultation as long as it is clearly outlined in the MOU that LRRCN and Alberta agree to use the process for consultation, and the processes within the MOU are consistent with the required precepts of First Nations consultation. The LRRCN MOU implies that it will be used for consultation purposes, and both parties informally acknowledge that it is used for that purpose (see generally Honda-McNeil 2000) but the MOU does not explicitly commit to this purpose. Also, not all of the structure and processes within the MOU are consistent with the required precepts of First Nations consultation, as illustrated in the preceding analysis. These would have to be amended to reflect the aim of meeting the requirement of consultation in the MOU.

Finally, it is important to address a fundamental difference between the Alberta-LRRCN context and the B.C-Saulteau context. In the B.C. context, there is an express commitment in the *Oil and Gas Commission Act* to "encourage the participation of First Nations and Aboriginal persons in processes affecting them" with the intent of respecting Aboriginal and Treaty rights in a manner consistent with s.35 of the Constitution" (*Apsassin*, paras 164 and 165, respectively).[135] In Alberta, there is no equivalent legislation to guide representatives of the Crown in the management and decision making on Crown lands specifically with respect to Aboriginal rights and interests, oil and gas development or otherwise, nor does the province perceive a need for legislation in context of 'taking up lands' under Treaty (as described above). At the time of writing, the closest representation of such a commitment is the broad policy commitments made by Alberta in *Strengthening Relationships: The Government of Alberta's Aboriginal Policy Framework* (2000), which have yet to be fully implemented, even in the policy context.

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[134] The Supreme Court also notes in *Haida* (para. 51) "It is open to government to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in *Adams* the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decisions makers."

[135] This legislation does not expressly require that all input by First Nations be directly incorporated into management plans, nor is this required, as long as the combined effect of the legislative and policy measures result in the meaningful involvement of First Nations in the decision making process through consultation.

The principles of consultation outlined above describe precepts that support good consultation: they are not a checklist of required criteria. The degree of consultation necessary is determined on a case-by-case basis and is inherently context-driven (*Haida,* para 39). An ultimate determination of whether adequate consultation has occurred may require the involvement of the Courts (Isaac and Knox 2003:para.57; Fisher 2002:3; Garton 1999: 4-5; *Delgamuukw v. B.C.* (3 S.C.R. 1010 [1997]) at para.168)). At least within the LRRCN-Alberta context (and with the necessary legislative, policy and agreement changes), I suggest that the LRRCN MOU process may constitute a meaningful consultation mechanism for resource developments that have the potential to impact the rights of the LRRCN.

8.4 Applying Accommodation in a Treaty 8 Context

As mentioned in section 4.4 above, the Supreme Court in *Haida* specifies that accommodation is not a regular step in consultation, but is rather a requirement which may be appropriate in select circumstances (para. 47). Consultation and accommodation are linked given their common source in the reconciliation of rights, and the fact that "good faith consultation may be to reveal a duty to accommodate" (para. 47). Also, as with consultation, the requirements of meaningful accommodation are very dependent upon the nature of the circumstances at hand. Accommodation is different than "substantially addressing concerns and a willingness to make changes based on information" (principle 5 of stage three consultation) because the latter attempts to incorporate "information" into project planning, whereas the former attempts to incorporate the rights and interests themselves.[136] The following precepts of accommodation were outlined:

1. Accommodation is activated when the consultation process suggests amendment of Crown policy.
2. Accommodation requirements are informed by good faith consultation.
3. Accommodation may require taking steps to avoid irreparable harm, minimizing effects, or considering the priority of Aboriginal rights in management and allocation decisions.
4. Accommodation does not necessitate agreement, although in rare cases of established rights it may require consent.

[136] As outlined in section 4.4, an example may be found in the case of the right to fish for food in Alberta. Substantially addressing concerns and making changes based on First Nation information might require that fishing regulations be altered to allow for an extra two weeks of spawning in a lake, thus facilitating the continued enjoyment of the right to fish for food but also the interests of conservation and other stakeholders. Accommodation in this same circumstance (when merited) could see the lake closed to all fishing except Aboriginal subsistence fishing, or perhaps a reduction of fishing licenses on the lake to reduce fishing pressure from other stakeholders

5. The Crown bears the burden of proving that its occupancy of lands cannot be accommodated with competing and conflicting Aboriginal rights.

Arguably, the LRRCN cooperative management planning process is an appropriate vehicle for discharging the duty of the Crown to accommodate. Given that the first two precepts outlined above are statements about the nature of accommodation, I will focus my analysis below upon the content of accommodation and how it may be discharged in the LRRCN MOU context (the last three precepts).

(3) "Accommodation may require taking steps to avoid irreparable harm, minimizing effects, or considering the priority of Aboriginal rights in management and allocation decisions"

Long-term management may affect the rights and interests of First Nations and planning decisions including access management, resource allocation, and renewable and non-renewable resource harvest strategies. Although there may be no immediate impact to First Nations rights and uses, poor long-term strategies can have devastating and irreversible effects on things like habitat for moose or fish, or migratory routes for birds or caribou. For example, over-allocation of grazing leases on Crown lands may reduce available forage for game and may increase the interaction of domestic and wild animals, which in turn may lead to the transfer of domestic disease (i.e. tuberculosis) to sensitive wildlife populations. Likewise, water diversion and allocation in watershed management may fail to take into account longer-term trends in precipitation or water flow, which could destroy sensitive delta areas or fish spawning areas.

Natcher *et. al.* (2002) have clearly illustrated how longer term land and resource development trends may impact habitat and traditional uses in the broader traditional use area of the LRRCN. Their approach applies practical and community-driven criteria and indicators as a method to minimize ecological impacts on the environment. Interestingly, this strategy not only involves the community in the identification of the criteria, but also uses local knowledge holders to help monitor and advise management decisions. The result is better, more ecologically sustainable management of the landscape that LRRCN people continue to use for their livelihood. For example, the researchers identify wood bison as a key indicator of ecological and cultural sustainability (Natcher *et. al.* 2002:356). When the effects of upland forestry operations began to impact bison habitat in lowland areas (stream flow fluctuations, erosion, sedimentation), community hunters and trappers reported their observations. The result of these observations and associated management recommendations

was a reduction in timber harvesting in upland areas, with streamside buffers being increased to offset increased drainage. Using this community-based resource management approach, accommodation of rights becomes less of a legal/theoretical construct and more of one aspect of a larger scheme for responsible management of the landscape for multiple uses.

In a Treaty 8 context, negotiated rights and privileges may be sufficiently specific enough to activate the fiduciary component of the honour of the Crown. The Crown made clear promises that the way of life of signatory First Nations would remain unchanged after Treaty. If the fiduciary duty is engaged in consultation in a Treaty 8 context, this may have the effect of pushing a case further up the spectrum, with the accommodation of rights being almost a presumption rather than a consideration in many circumstances. Further, minimizing effects, avoiding irreparable harm and the consideration of priority may be more stringent given the fiduciary duty of the Crown. In *Delgamuukw* Lamer C.J. also notes at least in an Aboriginal title context, accommodation may entail that the government accommodate the meaningful participation of Aboriginal people in resource development (para. 167). Of course, the reasoning for this assertion is the unextinguished Aboriginal interest in the land in that context. Lamer C.J. goes on to note (para 167) "No doubt there will be difficulties in determining the precise value of the aboriginal interest in the land and any grants, leases or licences given for its exploitation." In the context of solemnly negotiated rights to continue a way of life through hunting, trapping and fishing that are entrenched in Treaty 8, the "precise value" will be no less difficult to determine for the purpose of accommodation. Cultural integrity is more than the sum of its constituent parts. Finally, because Treaty 8 covers a region of northern Alberta which is slated for ongoing, intensive development and settlement by the Crown over time, it may be that the fiduciary component of the Crown will require a greater involvement of First Nations in the long term, strategic management and planning of the region. This way, subsistence Treaty rights could be proactively accommodated in the management of Crown lands and the way of life of First Nations can be integrated in planning processes.

The cooperative management Board established under the MOU is an ideal forum for discussing the accommodation of First Nations rights and traditional uses in the long term, strategic management and planning of the region. Indeed, it is clearly within the mandate of the Board to undertake these discussions, in relation to the commitment to jointly develop a Detailed Forest Management Plan (DFMP) (Appendix 1, page 7 at (c)):

(c) The parties agree that without limitation, the Forest Management Plan will:

(i) establish resource use priorities that are compatible with sustainable development and traditional use of the area by First Nations;

(ii) develop objectives and guidelines for use of the forest resources in the Special Management Area;

(iii) identify and foster employment and training opportunities for the First Nations associated with the management of natural resources within the Area; and

(iv) set out special initiatives to address all wildlife and wildlife habitat concerns.

Hence, the goal for the Board in the development of the DFMP is to employ development strategies that can accommodate First Nations interests, making development and settlement plans compatible with existing First Nations use of the land. It is assumed that the same would be the case for other resource development plans that came before the Board such as access plans for oil and gas exploration and development.

There is also express mention of the longer-term goals that represent meaningful reconciliation through accommodation such as increased community capacity, self-sufficiency and increased economic participation in the benefits of development (point (c) iii at p.7 of Appendix 1). Awards of significant timber tenure to the First Nations also represent a meaningful participation of Aboriginal people in resource development (*Delgamuukw*, para. 167). LRRCN and TCFN have also negotiated separate agreements represented by letters of intent with partnering forestry companies which expressly provide for comprehensive training, employment and First Nation business development. The MOU mandate to identify business, employment and training opportunities for LRRCN/TCFN has also resulted in the Natural Resources Initiative (NRI) between Alberta, the Department of Indian Affairs and Northern Development and LRRCN/TCFN which is specifically geared towards increasing LRRCN/TCFN participation in the economy (LRRCN 2000d:9). Together, these benefits under the MOUs illustrate that the LRRCN cooperative planning process can satisfactorily accommodate the rights and interests of the First Nations.

(4) "Accommodation does not necessitate agreement, although in rare cases of established rights it may require consent"

In guideline six above, the effect of consent on the cooperative management planning process was outlined. The focus there was to determine if the Board was, or could be manipulated to be, a consent-based process. As a consultative mechanism, the Board would

be in contravention of one of the key principles of consultation if it were. It was shown there was an acceptable check on all recommendations of the Board in the ultimate decision making power of the Minister. This assurance may be both a blessing and a curse to the cooperative management planning process, when one considers that accommodation from time to time may require the consent of affected First Nations communities. As mentioned in section 4.4 above, in some cases where the impacts of Crown action seriously jeopardize the rights at stake through a large scale development (e.g., oil sands development) or through cumulative effects, the fiduciary duty may require the Crown to seek the consent of a First Nation before conducting the activity. Also, given that the fiduciary component of the Crown may be activated in the context of accommodation in Treaty 8, consent may also be required more frequently, and perhaps in situations with substantially less impact. To ensure that the cooperative planning process can remain adaptive to all the requirements of the Crown in the reconciliation of First Nation rights, a revised MOU may consider addressing this dilemma. One option would be to place a proviso in the MOU, which notes that in cases where both the Crown and First Nation members agree that consent of the affected communities may be required for a project to go forward, further discussion and agreement between the Crown and the affected First Nation communities will be required.

(5) "The Crown bears the burden of proving that its occupancy of lands cannot be accommodated with competing and conflicting Aboriginal rights"

The purpose of this precept of accommodation is to ensure that the Crown maintains a high degree of responsiveness to First Nations where their rights need to be accommodated for the purposes of reconciliation. In a Treaty 8 context where the fiduciary duty of the Crown may be activated, the effect of this precept may be to impose the concept of "reverse onus" in general fiduciary law, as discussed above in section 5.3. Once breach of fiduciary obligation is alleged, the fiduciary is burdened with the onus of proof to rebut the charges and is subject to a presumption of wrongdoing. This precept follows naturally from the strict standard of utmost good faith incumbent upon the fiduciary. It reflects an acknowledgement of the Courts of the extreme power imbalances that are inherent in fiduciary relationships as well as the power of the fiduciary to conceal inappropriate actions and the evidentiary challenges and capacity issues that may exist for disadvantaged beneficiaries (Rotman 1996:183). To rebut the allegation of breach the fiduciary must prove to the Court that he/she has acted solely in the best interests of the beneficiary. The court's role is to simply confirm or deny the claim of the beneficiary, and, where the claim is justified, to apply the appropriate

remedy. Given that the Crown-Aboriginal relationship in Canada is *sui generis*, the effect of this duty is altered somewhat. Here the breach of duty does not occur because of competing duties but rather when occupancy of lands cannot be accommodated with competing and conflicting Aboriginal rights in a broader process of reconciliation.

Under the MOU, the Boards' role is inherently advisory. Recommendations are made to the Minister, but the Minister holds the ultimate power to make decisions for resource development and management in the SMA. When the recommendations of the Board are not followed, there is no obligation on the Minister to report back to the Board (or the First Nations) on the reasons why. As a result, the current process does not discharge this precept of the duty of accommodation owed by the Crown to LRRCN. In order to meet the requirement, the MOU may need to be altered to incorporate a feedback loop from senior Crown field staff or decision makers to the Board, which would necessitate the provision of written reasons why the recommendation of the Board was not followed. If there is discomfort on the part of the Crown in reporting back to an advisory body, a similar feedback loop could be designed that would focus the response of the Crown to the affected First Nations.

8.5 Additional Challenges: Within and Outside the LRRCN-Alberta Context

The LRRCN situation is unique for several reasons. First of all, LRRCN is still relatively remote and there is limited access to many parts of the territory traditionally used by the community.[137] Second, development in the SMA continues to be dominated by the renewable resource activity of timber harvesting (although there is potential for substantial mineral and oil and gas development to permeate the SMA). There is also relatively little competition from incompatible land uses, and no agricultural uses or land commitments currently exist within the SMA (LRRCN 2000a:3). Third, LRRCN and TCFN development corporations have been awarded timber tenure by the Alberta government and First Nations companies perform a significant amount of the development within the SMA.

In other areas of the province, First Nations proprietary interests in land and natural resources are confined to the boundaries of their reserves. Reserves are islands of First Nation jurisdiction surrounded by a variety of industries and stakeholder interests. White

[137] Indeed, permanent settlements for the LRRCN were not even created until 1959-1969 and the settlement of Garden River and Fox Lake remain accessible only by seasonal roads. Nelson (2003:7) notes that the result of this isolation has been the relative preservation of Cree language, culture and traditional vocations of hunting, fishing and trapping in comparison to many communities further south.

competition for wildlife resources, whether from hunting, sport or commercial fishing, and trapping, is intense. A mixture of public and private lands, protected areas, parks and recreation areas often surrounds reserves. Even on public lands, grazing leases and other property interests may be awarded and access is usually well established through road corridors and trails. Also a host of existing or emerging surface/subsurface industrial interests and infrastructure may also exist including active oil and gas wells, open gravel mining pits/rock quarries, mineral exploration or extraction, pipelines, utilities, storage areas, seismic lines, processing facilities, compression stations and transmission stations. In addition, well-funded representative bodies such as fish and game associations, industrial associations and wildlife activist groups often back competing use of resources.

Currently, outside of major projects, the province of Alberta generally downloads responsibility for consultation and public participation requirements onto project proponents. Dispositions for the surface and subsurface are often individually allocated to a host of industrial interests represented by a multitude of individual contractors and sub-contractors. Cooperation is usually limited among them for a variety of reasons including limited time and resources to devote to sharing information on development strategies, competition for the same limited resource market or client, and confidentiality concerns. First Nation owned companies in these markets are generally fewer in number, smaller and struggle with staff turnover and filling positions with First Nation personnel that have the capacity or qualifications to perform the tasks required.

These factors may make applying the LRRCN MOU as a model for consultation in other parts of Alberta difficult. Given the number of resource players, stakeholders and other interests that may be affected on a routine basis, the size of the Board could be substantial, especially if one were to maintain the precedent set in the LRRCN MOU which suggests that First Nations hold a majority of the seats on the Board. Given the quantity of divergent interests in many areas the Board may evolve into a forum for conflict rather than cooperation, and lobby groups would undoubtedly press their agendas at meetings. Even though many of these groups would not be granted voting status, progress of the Board could be slowed and its usefulness as a planning tool could wane.

Given the variety of industries and the amount of active and pending dispositions on Crown land in much of the Province, the desire for rapid development of resources in most accessible areas of Crown land and with extraction often being affected by seasonal variables, pressures would likely mount to expedite processes through increased meetings or by relaxing standards. Further, one development might require the discussion of multiple

dispositions and this would be multiplied by the number of industrial interests present in the planning area.[138]

Also, in some areas of the province, multiple First Nations claim the same area as their traditional territories. One proposed development might infringe the rights of five First Nations. Even if all five First Nations were represented on the Board, progress on the Board might be frustrated when one or two of the First Nations do not support development and other First Nations are satisfied with the plans of a proponent to accommodate, avoid, or minimally infringe their rights. Alternatively, one First Nation might feel that they have a greater entitlement to an area (perhaps through more frequent or intensive use) and demand extra consideration in terms of employment opportunities or compensation.

Confusion also arises in terms of how to involve other interests where a very large project or the cumulative effects of multiple projects have the potential to affect interests at a great distance from the planning area. Where multiple First Nations participate, they may be reluctant to share confidential information with the Board. This could occur, for example, if two First Nations have a pending land claim for the same area. Industry participants may also be unwilling to share confidential information in a Board setting where their competition is represented, such as when seismic evaluation of an area may reveal where productive oil and gas deposits are located.

In the LRRCN MOU, a large volume of timber was allocated to the First Nations in anticipation of significant renewable resource extraction in the SMA. The First Nations themselves directly benefit from cooperative management and there was clear incentive to remain involved and push for successful planning and development of the SMA. This also was a way to offset the costs of the process, allowing the Crown to consult the First Nations without having to directly cover the costs of First Nations participants. In other contexts the Crown would likely be either unwilling or unable to award such interests to First Nation partners.[139] Although economic opportunity and partnership with project proponents is very possible, it would be difficult for one proponent to negotiate a deal with one or many First Nations when all those Nations are at the same table at the same time. Also, if negotiation with a large company produces a very lucrative contract, challenges might be created for

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[138] For example, oil and gas exploration may require timber removal for seismic testing, subsequent expanded access to develop key oil reserves requiring more timber removal (placing a drilling rig, building an access road, etc.), and eventually a processing facility and pipeline for transportation.

[139] At least with respect to the renewable resource of timber, all available Crown timber is fully allocated in the rest of the province, and non-renewable resources operate under a different system of allocation where the Crown is required to auction off sub-surface rights to the highest bidder.

smaller company players.[140]

The combined effect of these considerations is that the cooperative planning process established under the LRRCN MOU may not be a useful tool for consultation outside of contexts that share the unique attributes of the LRRCN situation. However, this does not mean that this process would not be useful as a planning mechanism that is simply geared towards involving First Nations and other groups in the general long range planning of an area (i.e., outside contexts of specific infringement).

8.6 The Second Research Question

2) Does the Cooperative Management Planning process, established under the MOU, provide an effective institutional framework for implementing the Aboriginal community self-reliance and community wellness commitments outlined in *Strengthening Relationships: The Government of Alberta's Aboriginal Policy Framework* (2000)?

The *Government of Alberta's Aboriginal Policy Framework* (APF) is designed to address two fundamental goals in relation to Aboriginal people in the province: 1) improving socio-economic opportunities for Aboriginal peoples and communities and 2) clarifying roles and responsibilities of federal, provincial and Aboriginal governments and communities (APF 2000:1). Alberta identifies several strategies that can be used to accomplish the goal of improving socio-economic opportunities for Aboriginal peoples and communities. These include addressing barriers to Aboriginal participation in the economy, capacity building, partnerships, resource development, 'other' economic opportunities and government business planning/coordinated program delivery (APF 2000:8-9).

These strategies aim at achieving the underlying goal and vision of the APF which is described as "...a future in which strong, sustainable Aboriginal economies support self reliant First Nations, Metis and other Aboriginal communities and people" (APF 2000:7). The specific community wellness and community self reliance commitments in the APF are intricately connected with this broader vision and the strategies designed to achieve it, and should be understood in that context. They are outlined as follows (APF 2000:10-11):

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[140] In some cases it might also be tempting for a First Nation to back only the projects that offer a certain rate or remuneration, while refusing to support smaller projects or companies who also are required to come to the Board for consultation purposes.

PRINCIPLES	COMMITMENTS TO ACTION
ENHANCED ABORIGINAL WELL-BEING	
• Government of Alberta Ministries share responsibility for achieving the well-being of Aboriginal people in Alberta, including Aboriginal persons with disabilities • While respecting the responsibilities of the federal government to provide services to First Nation communities and persons, ensure that Aboriginal people have access to provincial public services enjoyed by Albertans in communities of similar size and geographic location.	• Work with First Nation, Metis and other Aboriginal organizations to develop and implement strategies to achieve the goal of enhanced Aboriginal well-being, -Including the development of an Alberta Disability Strategy • Assist, where appropriate, First Nation, Metis Settlements and other Aboriginal communities and organizations to build capacity to enhance community and individual well-being.
ENHANCED ABORIGINAL SELF-RELIANCE	
• The Government of Alberta recognises the importance of federal, provincial and community social and economic policy initiatives to support the self-reliance of First Nation, Metis and other Aboriginal people and communities in Alberta • "Aboriginal self-reliance" means the ability of First Nation, Metis and other Aboriginal communities and individuals to manage their own affairs, develop a sustainable economic base, and participate in partnerships with governments and the private sector.	• Work with the federal government, First Nation, Metis and other Aboriginal people to refocus existing federal, provincial and community programs toward a goal of individual Aboriginal self-reliance.

Considering these principles and commitments within the larger context and vision of the APF it would appear that Alberta's motivation in the APF is to place Aboriginal individuals and communities on the same footing as other Albertans, so that they can enjoy the benefits of rich resources and opportunity in the province without getting caught in inter-jurisdictional gaps or bogged down by barriers. This strategy is of course based on a fundamental assumption that Aboriginal communities are sustained in similar ways as other communities; namely, by socio-economic factors such as employment, revenue and education. The focus of these strategies also therefore reflects this fundamental assumption and orbits around increasing Aboriginal socio-economic opportunity by reducing unemployment and increasing education, for example.

LRRCN (2000b:7) suggests that community well being should be given a broader interpretation in an Aboriginal context. This is because the LRRCN and TCFN see that the

notion of individual and community well being is intricately related to their cultural identity as Indigenous peoples in the boreal forest (LRRCN 2000b:7-8):

> In this context, ecological identity of the boreal landscape, cultural sustainability and community wellbeing are interrelated objectives…Our policy objective – to regain as much influence or control over our shared traditional territory as possible – is grounded in our belief that, as a boreal peoples, the health or our communities requires that we maintain our material and spriritual relationship to all other things (ie. animate and inanimate) which exist on this boreal landscape. This relationship is often referred to as "stewardship". **The relationship and its community ethic, reflect three fundamental cultural and spiritual values: respect, reciprocity and sharing.** Through the process of stewardship, our peoples have historically maintained a balance between our use of forest resources and the need to ensure that the boreal landscape is not damaged beyond the limits of sustainability. In this regard, we have acknowledged that "stewardship" is more about upholding the human-land relationship than about the management of resources. [emphasis in original]

In this view, community well-being is dependent upon more than how many jobs are available, what the average level of education is in the population or even the availability of provincial services on reserve land (although these are relevant considerations for maintaining the tenability of First Nations settlements in a concrete sense). In this view, well being and self sufficiency through involvement is more about power sharing and stewardship over the land and less about financial or other opportunities (LRRCN 2000b:8-9):

> The LRRCN/TCFN community well being (health) is fundamentally tied to our ability as a peoples of the boreal forest to be involved and to influence or control the management of the boreal forest landscape which we consider to be our geographic and spiritual "home". The SMA and the south-western quadrant of Wood Buffalo National Park reflect, in large part, a community understanding of "place" which grounds our cultural and spiritual understanding of who we are as a peoples. Cultural sustainability, to the extent that it involves preservation of our cultural identity, social and spiritual relationships and value associated with communal use of this "homeland" will require that LRRCN/TCFN remain actively involved in management of the SMA…The SMA is so much a part of the identity of the LRRCN/TCFN peoples, that community health and ecosystem integrity cannot be separated from each other. Our values demand that we, as stewards of this place, use our cultural and spiritual understanding of what is important and why it is important (i.e. our traditional ethic) to influence how our peoples, and others use the resources within this forest landscape.

The commitment of Alberta in the APF may be perceived to be a broad commitment to address the cultural wellness and self-sufficiency of Aboriginal peoples in the province (and LRRCN/TCFN specifically). If so, the way that cultural well-being and self sufficiency are understood should incorporate the perspectives of LRRCN/TCFN. Therefore, the question becomes whether the cooperative management planning process represents an effective

institutional framework for ensuring Aboriginal cultural sustainability and whether that process is an adequate vehicle discharging the requirements of the honour of the Crown (which is engaged even in situations of potential rights and claims, such as claims to a right of cultural integrity).

The cooperative management planning process, established under the MOU does represent an adequate vehicle for meeting any commitments, obligations or goals of protecting and ensuring the cultural sustainability of LRRCN generally or the duties of consultation specifically. At its core, the LRRCN MOU aims to involve LRRCN in the management and planning of the SMA, where the rights and traditional uses of the LRRCN persist. This fulfils the self-described desire of LRRCN to regain greater control over their traditional areas and to reassert their role as stewards of the landscape surrounding them (LRRCN 2000b:7-10). At the same time, the MOU facilitates better management practices by incorporating traditional ecological knowledge (Berkes 1989, 1994, 1999; Lewis and Ferguson 1988). Better management practices imply increased ecological sustainability, which in turn provides an environment for practices central to cultural sustainability to continue.

Finally, there are the explicit and implicit socio-economic aspects of the MOU regarding capacity building, increased economic participation, resource sharing, employment opportunities, and research and training opportunities. These facets of the agreement might not address cultural sustainability directly, but they allow First Nations settlements in the north to become more viable, addressing problems created by a failed strategy to create a reserve system that would see to the assimilation and 'civilization' of First Nation people. If First Nations communities and economies can become more economically viable, then perhaps another generation of LRRCN can be enticed to stay and carry on the way of life of their predecessors, and LLRCN culture truly will be sustained.

9. Conclusion

9.1 Restatement of the Research Questions and Results

Cooperative management of resources has been used across Canada and around the world as a way to involve Indigenous people in the management and allocation of resources (Berkes 1999). The results of each case are relative, with success often being an interpretation of each party involved in the process and correlative with commitment and expectation. Alberta is unique in its employment of this process to consult First Nations. However, as with other jurisdictions, the expectations, desires, hopes and perceptions of the process also vary. In the LRRCN-Alberta context, it is clear that each party was using the cooperative management process for unique reasons. For LRRCN/TCFN, the MOU is considered a way to attain greater control over traditional territories for the purposes of ensuring that their cultural integrity is preserved. For Alberta, the MOU was viewed as way to reduce uncertainty by involving the First Nations in land management and planning processes. In order for the cooperative management planning process to be considered effective for all parties, the main aspirations of each party need to be attainable. Therefore the focus of this research was to answer the following questions:

1) Does the Cooperative Management Planning process, established under the LRRCN-Alberta Memorandum of Understanding (MOU), satisfy the Crown duty to consult LRRCN in relation to Crown decisions which have the potential to infringe on Aboriginal and Treaty rights and interests?

2) Does the Cooperative Management Planning process, established under the MOU, provide an effective institutional framework for implementing the Aboriginal community self-reliance and community wellness commitments outlined in *Strengthening Relationships: The Government of Alberta's Aboriginal Policy Framework* (2000)?

My hypotheses relating to these questions were outlined as follows:

1) It is anticipated that the Cooperative Management Planning process established under the LRRCN MOU may be utilized to discharge any Crown duty to consult with LRRCN in relation to Crown decisions which have the potential to infringe on Aboriginal and Treaty rights.

2) It is anticipated that the Cooperative Management Planning Process established under the LRRCN MOU provides an effective institutional framework for implementing the Aboriginal community self-reliance and wellness commitments outlined in the APF.

Using method and theory from the disciplines of law and anthropology, I researched the questions by considering the nature of fiduciary relationships, the LRRCN context, the LRRCN Cooperative Management Planning Process established under the LRRCN MOUs, the application of fiduciary law to the *sui generis* Crown-Native relationship in Canada, the nature and scope of the duty to consult First Nations people in the province, the application of the fiduciary relationship to the province of Alberta and Alberta's undertaking towards LRRCN/TCFN. I concluded despite the recent ruling in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (FCA No. 66 [2004]) that my analysis remains relevant because:

1) The Court in *Mikisew* does not adequately consider cumulative effects of development on the landscape in its analysis.

2) The Court improperly interprets the Treaty rights at stake and the Crown's right to "take up" lands, given the nature and purpose of Treaty 8 as well as the honour of the Crown.

3) The Court fails to consider the commitments of the Crown in Treaty 8 that the way of life and cultural sustainability of First Nations would be assured.

4) The recent Supreme Court decision in *Haida Nation v. British Columbia (Minister of Forests)* has illustrated that consultation is required even in cases where there is a credible but unproven claim.

I then applied the findings of the research to the questions through a detailed analysis of the Cooperative Management Planning Process established under the LRRCN MOU. The results of the application of the research findings to the research questions has illustrated that with some modification, the LRRCN MOU may be both a viable and desirable process for meeting the expectations and obligations of each party in the consultation process, at least in contexts that share similar attributes to the LRRCN-Alberta social, political, environmental, geographic, legal and historical milieu. Outside of that context, the efficacy of the cooperative management process to meet similar needs is less certain.

9.2 Additional Research and Considerations

Given the rapid state of change in this dynamic area of investigation and the increasing challenges to the maintenance of First Nations traditional culture and way of life,

more research is desirable. One area where there is a significant void of information concerns how, when and if First Nations should be involved in land and resource management planning (and resource allocation) which may be detrimental to First Nation cultural sustainability in the longer term. Models that predict cumulative effects of resource management need to be investigated so that these broader effects can be rightfully considered as conduct that might adversely affect rights or claims, thus triggering consultation in those circumstances. Rights are legal manifestations of integral cultural activities and infringement of rights implies a corresponding challenge to the maintenance of First Nations culture. Ongoing archival and community research is also essential. The specific scope and nature of the obligations of the Crown vary from community to community, and even the nature of consultation will ultimately be context driven depending on the significance of the impact and the rights or interests at stake. Community interviews can be used to complement existing data sets regarding historical or other information, and the Aboriginal perspective of Treaty, agreement and their relationship to the Crown is often an important factor in judicial analysis of Crown actions.

The timely production of baseline studies of traditional use and occupancy would also be useful. These studies demarcate the area used by First Nations, the nature of the use in that area and the type of sites located in that area. Traditional use studies can therefore be used as a tool for protection and education (i.e., curriculum development, or informing industrial interests of significant cultural and spiritual sites) or as a tool to facilitate better consultation, for example in terms of legitimizing the use of an area and establishing a 'consultation area'. They can also help gauge the impact of development in a quantifiable way for the purposes of compensation or other considerations. Traditional use studies also gather important traditional ecological knowledge from elders and knowledge holders in communities, which can be used to inform planning and development of the landscape.

9.3 Fumbling Towards Coexistence and Reconciliation

Since the formative years of the Crown-native relationship in Canada, the relationship has always purported to be one of trust, peace, friendship, solemnity and honour. Early interaction of European and Indigenous culture was mutually beneficial, with both sides benefiting from the plentiful resources existing on the land.[141] However, over time and for a

[141] Indeed, I would suggest that at that time many First Nations held a greater stake in the economy and resource development than they do today.

whole host of interrelated reasons, the ultimate effect of the acquisition of Crown sovereignty in Canada has been to disempower Aboriginal communities. First Nation cultures have largely been deprived of their self-sufficiency, mobility, and in many cases their traditional lifestyles. Still, many have adapted to these catastrophic changes and now desire a more equitable share in the lands where once they held exclusive jurisdiction. They are prepared to move ahead with new partnerships, new ways of making a living and new ways to protect the inheritance of the next generation—but not at the expense of their cultural identity or sustainability.

There has always been a fundamental principle and promise by which the Crown in Canada has secured the friendship, cooperation and trust of First Nation people. The essence of this commitment is written on many pages of our history from the *Royal Proclamation, 1763* to the many Treaties that have been signed over the years, and more recently in s.35 of the *Constitution Act, 1982*. This commitment, made on the honour of the Crown, is a simple promise but forms the heart and soul of the special trust relationship between the Crown and First Nations: development and settlement may come, but these things would happen in a sustainable way and with consideration of Indian interests.

Development and settlement of many parts of Alberta have greatly exceeded even the most liberal expectations of a hundred years ago. New developments in genetically modified grains allow farming in the cool and dry climate characteristic of northern areas. Oil and gas exploration has revealed that areas that were previously the least desirable for settlement purposes now may hold the largest reserve of petroleum in the entire world. Water resources in the north are becoming more and more attractive to southern settlements in dire need of additional water supply, and northern industrial expansion will also require greater amounts of water as time goes on. Competition for limited wildlife resources is exacerbated by increased access created through seismic exploration or temporary road allowances and an ever-increasing interest in recreational sport hunting and fishing. The total area covered by unoccupied Crown lands continues to decrease, while the population using those lands continues to increase exponentially. In addition, First Nation populations continue to grow at a rate far exceeding the rest of the country. In LRRCN, currently 75% of members are under the age of 30, which is three times the national average (Indian and Northern Affairs 2001) and Woodrow and Campa (2001) suggest that if population growth continues to increase at this rate, the population of LRRCN could double by the year 2021.

The traditional vocations of hunting, trapping, fishing and gathering may seem archaic to some, but to many First Nations these activities are essential for the sustainability

of culture. They continue to be the classroom where traditional knowledge of the land and of themselves is passed on to another generation. For LRRCN these activities also continue to be an important source of food as well, with virtually all LRRCN communities continuing to derive some measure of their livelihood from activities based in the forest (Nelson 2003). Ecological sustainability and cultural sustainability are interconnected, and the responsible management of the land and resources is necessary to sustain culture. In other words, many First Nations communities continue to rely on the honour of the Crown to fulfil its fundamental promise that development and settlement would come, but these things would happen in a sustainable way and with consideration of Indian interests—that there would be protection of the integrity and sustainability of Aboriginal culture to the greatest extent possible by balancing and reconciling rights.

To fulfil this promise, an equitable framework for balancing and reconciling rights must be employed. This is the crux of the matter: how to fairly balance and reconcile the interests of larger Canadian society and those of pre-existing Aboriginal societies. In the answer lies the solution to cultural sustainability, ecological sustainability and responsible management of public resources. The Courts are beginning to outline the legal requirements of what this should look like. Unfortunately, with the immense jurisdictional differences across Canada, in many cases a full and final framework may arrive too late to provide assurance to First Nations and too late to rescue the honour of the Crown in its dealings with Aboriginal people. This is one of those times as a nation that we must transcend legal minimalism and reach for something better. Sometimes, moral and ethical obligations should outweigh legal ones.

Perhaps the dawn of the new millennium will herald a new era of consultation, negotiation and meaningful communication between Aboriginal peoples and the Crown, and such discussion in turn will spawn a greater understanding of the nature and scope of the Crown-Aboriginal relationship in Canada, and the obligations owed in that relationship. I believe the words of Chief Justice Lamer summarize these issues most accurately (*Delgamuukw v. B.C.*, 3 S.C.R. 1010 [1997] at para 186):

> Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s. 35(1) -- "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.

It is within the spirit of friendship, not rivalry, that the answers to rights-based questions reside—and in communication, not litigation, that they will be revealed.

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APPENDIX 1

MEMORANDUM OF UNDERSTANDING

THIS AGREEMENT IS MADE BETWEEN:

The LITTLE RED RIVER CREE NATION, represented by their duly authorized Chief, and Council;

AND

The TALLCREE FIRST NATION, represented by their duly authorized Chief, and Council;

(collectively referred to as the "First Nations" for the remainder of this Memorandum)

AND

The GOVERNMENT OF ALBERTA, represented by the Honourable Minister of Environmental Protection and the Honourable Minister of Family And Social Services and Aboriginal Affairs (referred to as "Alberta" for the remainder of this Memorandum).

PREAMBLE

WHEREAS Alberta and the First Nations recognize that it is in their best interest to achieve sustainable development within the First Nations' areas of traditional use (referred to collectively as the "Area" for the remainder of this Memorandum) to ensure that the Area's natural resources contribute to the development of the economies of Alberta and the First Nations;

WHEREAS Alberta and the First Nations recognize that resource management based upon the principle of sustainable development requires an integrated approach, taking into account the delicate balance between First Nations traditional or cultural uses with the rights of use enjoyed by non-natives;

WHEREAS the responsible management of the Area in accord with the principles of sustainable development will benefit all Albertans both now and in the future;

WHEREAS employment opportunities and economic development of Aboriginal communities are major priorities of Alberta as detailed by Strategic Direction Seven contained in the Canada Forest Accord attached as Appendix "A";

WHEREAS Alberta and the First Nations agree that opportunities for the participation of other stakeholders in the Area will be vital to the process;

WHEREAS Little Red River Forestry Ltd. is owned by the Little Red River Cree Nation, and is the holder of a coniferous timber quota certificate in Forest Management Unit F6 for the benefit of Little Red River Cree Nation and their peoples (the "Quota");

WHEREAS Alberta may only grant ministerial consent for long term coniferous timber permits for Forest Management Units F3, F4 and F6 to an incorporated entity owned by either of the First Nations for the benefit of the First Nations, and not to the First Nations directly;

WHEREAS Aaires Development Corporation is a not for profit corporation and is owned by the Little Red River Cree Nation for the benefit of the Little Red River Cree Nation and their peoples, and which will additionally benefit the Tallcree First Nation and their peoples;

WHEREAS Alberta and the First Nations agree that responsible management of the Area must be supportive of local and regional resource based economies;

WHEREAS Alberta and the First Nations, with a view to ensuring sustainable development, wish to engage in the preparation of a Forest Management Plan for that portion of the Area comprised by Forest Management Units F6, F3, F4 more particularly described in Appendix "B" (referred to as "Special Management Area" for the remainder of this Memorandum), in which First Nations will play an integral part ;

WHEREAS this Memorandum will not operate to abrogate, derogate, or in any way affect aboriginal rights nor the rights granted to these respective First Nations or any other First Nation pursuant to Treaty 8 or section 35 of the *Constitution Act 1982*, nor shall this Memorandum, or any subsequent agreement signed as a result of it, be construed as limiting the Government of Alberta in the exercise of its legislative and regulatory jurisdiction over matters in relation to natural resources; and

WHEREAS the intention of this document is to confirm existing commitments, state general principles, record the Parties' intentions, and to provide a broad framework for future agreements, and is not intended to create legally enforceable obligations.

THEREFORE THE PARTIES AGREE TO THE FOLLOWING:

1. Alberta and the First Nations commit themselves to the development of a Forest Management Plan for the Special Management Area, and in furtherance thereof agree to take the preparatory steps necessary to support the commencement of the process, including, without limitation, nominating representatives, passing resolutions as required, and committing sufficient resources.

[redacted]

2. Alberta and the First Nations agree that the following framework will guide the phased implementation of this Memorandum.

PHASE ONE:

Goal: To ensure that current and future timber management and dispositions are consistent with the spirit and intent expressed in this Memorandum.

Steps To Implementation:

(a) Alberta agrees to issue long term coniferous timber permits for Forest Management Units F3 and F4 to the Askee Development Corporation for the benefit of the First Nations (the "Permits"); The Permits will set annual harvest levels of 42,000 cubic meters in F4 and 19,000 cubic meters in F3. An immediate downward adjustment to these levels may be made by the Minister during the quadrant due to drastic depletion of the applicable growing stock by fire or other destructive causes.

These annual harvest levels will be reviewed during the forest management planning process. Harvest levels will be established based upon revised inventory information and the forest management strategies recommended in the plan.

The Permits will be issued for a term of not less than (1) one year and not more than (6) six years. The Quota and the Permits will co-exist for the remainder of the normal quota (20) twenty year period which is scheduled to expire in the year 2006. Thereafter, the Minister will review the Memorandum and the feasibility of renewing them based upon an assessment of the original objectives and the desire of the First Nations to continue.

(b) The First Nations will cause Askee Development Corporation, or other legal entity owned by the First Nations for the benefit of their peoples (whichever may be applicable), to commit coniferous timber resources within Forest Management Units F3, F4 and F6 to local and regional user groups whose interests are compatible with the management direction in the approved Forest Management Plan for the Special Management Area;

(c) The First Nations will cause Asiee Development Corporation, or other legal entity owned by the First Nations for the benefit of their people (whichever may be applicable), to carry out reforestation on all areas harvested under CTP's as referred to in this Memorandum.

(d) The First Nations will cause Asiee Development Corporation, or other legal entity owned by the First Nations for the benefit of their peoples (whichever may be applicable), to commit a portion of the timber resource revenue received from harvesting coniferous timber from Forest Management Units F3, F4, and F6 to the implementation of this Memorandum, such amount to be not less than $2.00 per cubic metre;

(e) Alberta agrees to provide administration cost funding respecting the implementation of this Memorandum (up to a maximum of 5% of Eligible Costs) by entering into the Master Agreements with the Asiee Development Corporation for the benefit of the Little Red River Cree Nation pursuant to the Forest Resource Improvement Program authorized under the Environmental Protection and Enhancement Act, for Forest Management Units F3, F4 and F6;

(f) This Memorandum does not apply to the disposition of, exploration for, or recovery of the mineral resources within the Area.

(g) Harvest operations will be conducted within the standards specified in the Alberta Timber Harvest Planning and Operating Ground Rules and within the conditions of approval for the permits.

(h) Harvest plans will be integrated to reflect the needs of other users and disposition holders within the area.

(i) The First Nations will cause Asiee Development Corporation or other legal entity owned by the First Nations for the benefit of their people (which ever may be applicable), to pay the regulation rate of dues applicable for the timber species harvested under the non-competitive permits.

Timelines: Step (a) and the initial aspects of step (b) will be undertaken immediately, with a completion date of June, 1995. The continued

commitment incorporated in steps (b) and (c), and steps (d), (e), (f) and (g) will be on-going throughout the currency of this Memorandum.

PHASE TWO:

Goal:

Complete an evaluation of the Special Management Area from an ecosystem approach by:

(a) reviewing existing data related to resource inventories, land use patterns and use impacts.

(b) identifying areas where further information will be required; and

(c) guiding and funding further studies.

Steps To Implementation:

(a) The parties agree to establish a Forest Management Planning Board (the "Board") with the responsibility for developing a Forest Management Plan including all aspects of carrying out the evaluation for the Special Management Area;

(b) The parties agree that the Board will be comprised of (3) three representatives from Alberta, (3) three representatives from the Little Red River Cree Nation, two (2) representatives from the Tallcree First Nation, and (1) one representative from the Municipal District of MacKenzie #23;

(c) The Board is empowered by this Memorandum to determine its own practice, procedure and processes evidenced by formal documents such as By-laws and Operating Procedures;

(d) Notwithstanding section (c) above, the parties agree that the Board will strive to develop consensus-based agreement. If the Board is unable to reach consensus on a matter before it, there must be a majority vote of the representatives of the First Nations before the matter can result in an agreement;

(e) The parties agree that in recognition of the interests of industry in the Special Management Area, the Board may also,

as required from time to time, have non-voting members from resource-based industries such as forestry or oil and gas;

(f) The parties agree that in recognition of particular environmental concerns that may arise in the Special Management Area, the Board may also, when required, invite the participation of a non-voting member representing special interest groups;

The parties recognize that opportunities for public consultation and for the receipt of multi-stakeholder input are vital to this process, accordingly, the Board may:

(i) identify groups of stakeholders to function as advisors to the Board;

(ii) establish mechanisms to solicit and review public comment; and

(iii) consult or second experts, as necessary, to assist the Board in reaching its recommendations; and

The parties agree to finance and empower their respective representatives. The parties agree to work collaboratively in securing access to funding including, but not limited to, forest resource revenues accruing in the Special Management Area, the aforementioned Forest Resource Improvement Program, as well as funds that may be contributed by the Government of Canada in recognition of their special fiduciary responsibility towards the First Nations.

Timelines: Steps (a), (b) and (c) will be completed on or before July 31, 1995. Completion of the information gathering and consultation process of this Phase is anticipated within (12 - 18) twelve to eighteen months from the date this Memorandum is signed.

PHASE THREE:

Goal: To prepare a Forest Management Plan for the Special Management Area that will be submitted for review by the Government of Alberta and the First Nations.

Steps To Implementation:

(a) The parties agree that the preparation of the Forest Management Plan for the Special Management Area will be the responsibility of the Board;

(b) The parties agree that sustainable development will be the fundamental principle guiding the development of the Forest Management Plan;

(c) The parties agree that without limitation, the Forest Management Plan will:

(i) establish resource use priorities that are compatible with sustainable development and traditional use of the area by the First Nations;

(ii) develop objectives and guidelines for use of forest resources in the Special Management Area;

(iii) identify and foster employment and training opportunities for the First Nations associated with the management of natural resources within the Area; and

(iv) set out special initiatives to address all wildlife and wildlife habitat concerns.

Timelines: Interim report within (2) two years from the date this Memorandum is signed.

PHASE FOUR:

Goal: To formulate strategies to ensure the Forest Management Plan is implemented in a manner that is consistent with the direction contained in the plan.

Steps To Implementation:

(a) To assist in the implementation of the Forest Management Plan, the Board may make recommendations regarding:

(i) specific management or development mechanisms that may be required;

(ii) administrative or contractual adjustments that may be necessary; and

(iii) amendments to regulations, laws, or government policies.

Timeliner: It is anticipated that the initial recommendations made under this Phase will be offered within (6) six months from the date the Forest Management Plan is reviewed and recommendations are made by Alberta and by the First Nations.

The parties agree that the matters contained and referred to in the Preamble to this Memorandum, Appendix "A" and "B" to this Memorandum, are expressly incorporated into and form part of this Memorandum.

1. This Memorandum shall be in force on the day immediately following the date on which all parties have signed, and shall continue thereafter for a period of (3) three years.

2. Any of the parties may terminate their obligations under this Memorandum by providing at least (30) thirty days written notice to the other parties. This written notice must include a statement regarding the reasons for the termination.

IN WITNESS WHEREOF the parties have executed this Memorandum at the Town of Peace River in the Province of Alberta, on Friday, the 26th day of May, 1995.

LITTLE RED RIVER CREE NATION

The Chief and Council of the Little Red River Cree Nation for an on behalf of the Little Red River Cree Nation, also known as the Little Red River Cree Indian Band

Per: _____
Chief

Per: _____
Council Member

Per: _____
Council Member

TALLCREE FIRST NATION

The Chief and Council of the Tallcree First Nation for and on behalf of the Tallcree First Nation, also known as the Tallcree First Nation

_____ _____
Witness Chief

Per: _____
Council Member

Per: _____
Council Member

Witness

ALBERTA

Minister of Environmental Protection

Witness

ALBERTA

Minister of Family & Social Services
and Aboriginal Affairs

APPENDIX 2

MEMORANDUM OF UNDERSTANDING

September 1, 1999

THIS AGREEMENT IS MADE BETWEEN:

The LITTLE RED RIVER CREE NATION, represented by their duly authorized Chief, and Council;

AND

The TALLCREE FIRST NATION, represented by their duly authorized Chief, and Council;

(collectively referred to as the "First Nations" for the remainder of this Memorandum)

AND

The GOVERNMENT OF ALBERTA, represented by the Honourable Minister of Environment and the Honourable Associate Minister of Aboriginal Affairs

(referred to as "Alberta" for the remainder of the Memorandum).

PREAMBLE:

WHEREAS

A. Alberta remains committed, through the adoption of the *Alberta Forest Legacy* and the Canada Forest Accord (1998), to the concept of sustainable development, adaptive management and the consideration of local views, values and needs in resource management.

B. Alberta and the First Nations concur on the need for development of sustainable ecological management practices so that the human use of the renewable natural resources does not exceed the ecosystem's ability to perpetuate itself;

C. Alberta has developed a Cooperative Management Framework document (November 1996) that promotes consultation and cooperation on renewable resource or environmental matters of mutual interest, and establishes principles on which MOUs are based;

D. The on-going efforts of Alberta and the First Nations to achieve sustainable development and cooperative management within the traditional use areas are identified in the Memorandum of Understanding dated May 26, 1995 as amended pursuant to the execution of Letter of Intent dated September 5, 1996;

E. Alberta and the First Nations support the principle in the National Forest Strategy, 1998 (Strategic Direction 7) which states:

> *To address their legitimate needs and aspirations, Aboriginal communities require greater access to forest resources, and an increased capacity to benefit from forests in their areas of traditional use and Treaty areas, and to contribute to their management.*

F. Alberta and the First Nations wish to engage in a cooperative renewable resource management planning process focused at a landscape level upon the use of renewable natural resources in a responsible manner which will support local and regional, resource based economies;

G. This Memorandum will not operate to abrogate, derogate, or in any way affect Aboriginal rights nor the rights granted to these respective First Nations or any other First Nation pursuant to Treaty 8 or section 35 of the *Constitution Act 1982*; nor shall this Memorandum, or any subsequent agreement signed as a result of it, be construed as limiting or impairing Alberta in the exercise of its legislative and regulatory jurisdiction over matters in relation to natural resources;

H. Alberta and the First Nations acknowledge and agree that this Memorandum is not an allocation process for renewable resources and Crown lands, nor does it create any proprietary interests in renewable resources and Crown lands; and

I. The intention of this document is to confirm existing commitments, state general principles, record the Parties' intentions, and to provide a broad framework for future agreements. This document is not intended to create legally enforceable obligations.

THEREFORE THE PARTIES AGREE TO THE FOLLOWING:

ARTICLE 1: INTERPRETATION

1.1 Definitions

For the purpose of this Agreement, each of the following expressions has the meaning ascribed to it in Section 1, unless otherwise specifically provided:

(a) "Agreement" means this Memorandum of Understanding dated the 1st day of June, 1999;

(b) "Cooperative Renewable Natural Resource Management Plan" means a landscape assessment and a resource management philosophy and goal statement more particularly described in the *Interim Forest Management Planning Manual, April, 1998* published by Alberta Environmental Protection;

(c) "Cooperative Renewable Natural Resource Management Planning Process" (or concisely cooperative planning process) means a process to establish one or more forms of collaborative forest management planning which, as outlined in the *Alberta Forest Legacy*, will continue to evolve between the various industrial, commercial and community users of the renewable natural resources;

(d) "Cooperative Management Planning Board" means the Board established pursuant to the MOU dated May 26, 1995 as amended by the Letter of Intent dated September 5, 1996 and modified and expanded herein;

(e) "Forest Management Plan" means the completion of long range and operational timber plans as required through the *Forest Act* and the *Timber Management Regulations*, A.R. 60/73;

(f) "Renewable Natural Resources" means all those forest resources including air, land, water, forest, fish and wildlife, parks and natural areas, as contemplated in the concept of sustainable forest management. Renewable natural resources does not include sub-surface, non renewable resources including oil, gas, precious metals, mines or minerals;

(g) "Resource Management Philosophy and Goal Statement" means a statement to guide management of renewable natural resources within the Special Management Area for a period of approximately five (5) to ten (10) years in duration. Such a Resource Management Philosophy and Goal Statement is intended to reflect the policy objectives and guidelines found in national and provincial agreements and policies related to the management of renewable natural resources.

(h) "SFM-NETWORK" means the Network of Centres of Excellence in Sustainable Forest Management with local offices conducted through the University of Alberta;

(i) "Special Management Area or SMA" means that Crown forest land base defined by Forest Management Units F2, F3, F4, F5, F6, F7, and portions of F10 and A9 or, as subsequently modified and agreed to by the Cooperative Management Planning Board; and

(j) "Technical Planning Committee" means that committee established through mutual agreement by the regional, resource-based industries with business interests and activities within the SMA.

1.2 Preamble and Schedules

The Parties hereby confirm and ratify the matters contained and referred to in the Preamble and all Schedules of Appendices to this agreement and agree that same are expressly incorporated into and form part of this agreement.

ARTICLE 2: MUTUAL COMMITMENTS

Alberta and the First Nations commit themselves to the implementation and conduct of a cooperative renewable natural resource management planning process related to management of renewable natural resources within the Special Management Area;

Alberta and the First Nations commit to take all those actions necessary to support the ongoing conduct of this cooperative renewable natural resource management planning process;

Alberta and the First Nations agree and commit themselves to fulfil and honour all those outstanding obligations contained in the MOU of May 26, 1995, as amended by the Letter of Intent dated September 5, 1996, and which are not specifically modified by the terms of this agreement. The commitments are enclosed as Appendix 1.

ARTICLE 3: THE COOPERATIVE MANAGEMENT PLANNING BOARD

3.1 Alberta and the First Nations agree that the Cooperative Management Planning Board (the "Board") established pursuant to the May 26, 1995 Agreement, shall continue as part of the cooperative planning process:

Membership of the Board

Members	Eligible Voting Representatives
Alberta	3
Little Red River Cree Nation	3
Tallcree First Nation	2
Municipal District of Mackenzie No. 23	1
Daishowa-Marubeni International Ltd.	1
Footner Forest Products Ltd.	1
Askee Development Corporation	1
Netaskinan Development Corporation	1

3.3 Alberta and the First Nations agree, in recognition of the emerging interest by industry in the development of oil, gas, precious metals, mines and mineral resources, that the Board, at its discretion, may undertake to solicit and encourage membership by industry stakeholders and by the Alberta Department of Resource Development:

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3.4 Alberta and the First Nations agree, in recognition of environmental matters which might arise within the Special Management Area, that the Board, at its discretion, may invite the participation of environmental non-government organizations or special interest groups in the cooperative planning process; and

3.5 Alberta and the First Nations agree that this cooperative planning process must include full opportunity for public consultation and the inclusion of multi-stakeholder input. Accordingly, the Board, in consultation with its participating industrial, First Nation and government organizations, will:

(a) identify and implement a process for stakeholders to interact with the Board;

(b) establish mechanisms for public review and comment; and

(c) consult with, or second experts as necessary to assist the Board.

ARTICLE 4: BOARD PROCESS AND INTEGRATION

4.1 Alberta and the First Nations agree that, subject to the provisions of Appendix 2, the Board is empowered by this MOU to determine its own practices, procedures and processes evidenced by formal documents including By-laws and operating procedures;

4.2 Notwithstanding section 4.1 above, Alberta and the First Nations agree that the Board shall strive to develop consensus-based practices, procedures, and processes. If the Board is unable to reach consensus on a matter before it, any matter decided by a majority vote of Board members must include a majority vote of First Nation Board members in order to effect a Board agreement;

4.3 Alberta and the First Nations agree that the Technical Planning Committee, established through agreement by the regional resource based industries, shall remain in place, and shall be given a mandate to support and assist the Board to develop and conduct a cooperative planning process. The Technical Planning Committee, as established, is comprised of representatives from the following within the Special Management Area:

Daishowa-Marubeni International Ltd.
Footner Forest Products Ltd.
Askee Development Corporation
Nerasickman Development Corporation, and
Little Red River Cree Environmental Division;

The Technical Planning Committee will develop a terms of reference that will be signed by members of the Technical Planning Committee and will be forwarded to the Board for review and approval.

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4.4 Alberta and the First Nations agree, given their respective membership and participation in the SFM-Network, that the Board shall establish a cooperative research and planning relationship with the SFM-Network Caribou-Lower Peace Research Initiative. This cooperative research and planning relationship is viewed by Alberta and the First Nations as responsive to the principle of adaptive management, and the need to establish ecological management practices within the Special Management Area.

ARTICLE 5: BOARD FINANCE AND FUNDING

5.1 Alberta and the First Nations agree to finance and empower their respective representatives on the Board; and

5.2 Alberta and the First Nations agree to work cooperatively towards identification of funding sources and securing funds to support the cooperative planning process and the associated SFM-Network research within the Special Management Area through sources that may include without limitation:

(a) private sector, corporate forest resource revenues accruing within the Special Management Area;

(b) funds that may be available through the Forest Resource Improvement Association;

(c) funds solicited from the Government of Canada in recognition of their special fiduciary responsibility toward the First Nations.

ARTICLE 6: APPROVAL PROCESS

Considerations

6.1 The parties to this MOU acknowledge and agree that Ministerial discretion can not be fettered. The Board shall report to the Minister of Environment and the Minister has final decision making authority on matters within provincial jurisdiction.

6.2 Alberta and the First Nations agree that, upon approval of the Resource Management Philosophy and Goal Statement by the Minister, the Board shall have a mandate and responsibility for providing advice and recommendations to the Minister on the following:

(a) development of renewable resource management mechanisms or processes which are required to implement the integrated resource management process;

(b) development of administrative or contractual relationships which are required for implementation;

(c) recommend amendments to regulations, policies or laws which are required for implementation.

6.3 The Board will work collaboratively with local and regional, resource based industries operating within the Special Management Area to ensure that management plans, strategies and practices reflect the goals and objectives established through this cooperative planning process.

ARTICLE 7: BOARD REPORTING/TERM OF THE AGREEMENT

7.1 The Board will prepare annual reports for the year ending March 31st, which outline its activities and the results that have been achieved. These reports will include an assessment relating to the performance measures and business plans of appropriate Alberta government departments.

7.2 Consistent with Alberta's three-year business planning cycle, this MOU will be in effect until March 31, 2001. At that time, the Parties will undertake a formal evaluation of the progress and results that have been achieved, as the basis for determining renewal of the MOU and any modifications that may be required.

7.3 Any of the parties may terminate this Memorandum by providing at least (30) thirty days written notice to the other parties. The written notice must include a statement regarding the reasons for the termination.

7.4 The Parties agree that this Memorandum of Understanding will become a public document upon execution.

LITTLE RED RIVER CREE NATION

Chief Johnsen Sewepagaham

TALLCREE FIRST NATION

Chief Frank Maneen

ALBERTA

Per: _____

Minister of Environment

ALBERTA

_____

Associate Minister of Aboriginal Affairs

APPENDIX 1

Alberta and the First Nations agree and commit themselves to fulfil and honour all those outstanding obligations contained in the MOU of May 26, 1995, as amended by the Letter of Intent dated September 5, 1996, and which are not specifically modified by the terms of this agreement. Without limitation, these commitments include:

(a) to prepare a Forest Management Plan using the Interim Forest Management Planning Manual for the specific areas contained within the geographic boundaries of Forest Management Units F3, F4 and F6;

(b) prepare a Cooperative Renewable Natural Resource Management Plan for the Special Management Area that will be submitted for review by the Government of Alberta and the First Nations. This plan will consist of:

- a Resource Management Philosophy and Goal Statement; and
- a list of recommendations for integration of this information with ongoing management plans and strategies within the SMA.

(c) ensure that current and future timber management and dispositions are consistent with the spirit and intent expressed in this agreement, as outlined more specifically in the 1995 MOU in the section entitled: "Phase One; Steps to Implementation";

(d) continue negotiations in a timely fashion for the purpose of formalizing First Nation involvement in the forest management of the Special Management Area. Such negotiations will deal with the establishment of Forest Management Agreements, economic opportunities for the First Nations and traditional use interests within the Special Management Area;

(e) enter into agreements where the Province will allocate an annual harvest to the First Nations concurrent with issuance of DTAs for the Footner Timber Development area, all subject to renewal consistent with coniferous quota renewal requirements; and

(f) enter into agreements under which future allocation of the timber stands in FMUs F3, F4, F6 and A9 will be made to corporations owned by the First Nations and this timber will continue to be available to support regional and local mill operations. Within the context of this agreement;

(i) Commercial Timber Permits or other appropriate tenure will be direct issued to Little Red River Cree Nation for volumes not exceeding the Annual Allowable Cut, within the context of harvesting these stands to meet the objectives of the Forest Management Plan in FMUs F3, F4 and F6.

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(ii) Commercial Timber Permits or other appropriate tenure will be direct issued to Tallcree First Nation for volumes not exceeding the Annual Allowable Cut, within the context of harvesting these stands to meet the objectives of the Forest Management Plan in FMU A9.

(iii) a forest inventory will be completed before the timber is committed to a development.

Alberta and the First Nations acknowledge and agree that nothing in this Appendix, nor any subsequent agreement signed as a result of it, be construed as limiting, impairing or otherwise fettering Alberta in the exercise of its legislative authority and regulatory jurisdiction over matters in relation to natural resources.

APPENDIX 2

Operational Guidelines for the Cooperative Management Planning Board

1. Alberta and the First Nations agree that the Board has a mandate and responsibility to undertake, and report on the cooperative landscape assessment related to management and use of renewable natural resources within the Special Management Area, including the planning mandate to consider;

   (a) environmental aspects related to eco-system integrity, biodiversity and landscape patterns and structure;

   (b) the presence of endangered, threatened or rare species of flora or fauna within the Special Management Area;

   (c) economic aspects related to resource values, current resource uses, potential future resource uses, development costs and opportunity costs associated with the prescribed resource uses;

   (d) social aspects related to the value of renewable natural resources from a First Nations perspective;

   (e) integration of ecological, economic and social aspects relating to planning and management responsibilities within the Special Management Area.

2. The Board will develop a Resource Management Philosophy and Goal Statement which, if approved by the Minister, is intended to guide the management and use of renewable natural resources within the Special Management Area. Without limitation, the fundamental principles guiding development of the Resource Management Philosophy and Goal Statement shall be sustainable development, ecological management and adaptive management as these principles are defined in the *Alberta Forest Legacy* and the *Interim Forest Management Planning Manual, April 1998*. Within the context of these three principles, the Resource Management Philosophy and Goal Statement shall:

   (a) recommend resource use priorities that are compatible with sustainable development and traditional use of the Special Management Area by the First Nations;

   (b) recommend objectives and guidelines for management and use of renewable natural resource with the Special Management Area;

   (c) identify economic development, employment and training opportunities and initiatives for the First Nations within the Special Management Area;

   (d) identify special initiatives to address First Nations concerns regarding management of wildlife and wildlife habitat within the Special Management Area; and